SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1203

VICTOR MADERA, RAMIRO MADERA, MANUELA MADERA, and all other persons similarly situated,

Petitioners,

—v.—

BOARD OF EDUCATION OF THE CITY OF NEW YORK, BERNARD E. DONOVAN as Superintendent of Schools of the City of New York, THERESA RAKOW as District Superintendent of Public Schools for District One in the City of New York.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

—v.—

BOARD OF EDUCATION OF THE CITY OF NEW YORK, BERNARD E. DONOVAN as Superintendent of Schools of the City of New York, THERESA RAKOW as District Superintendent of Public Schools for District One in the City of New York.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on December 6, 1967.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 386 F. 2d 778 (1967) and is set forth in Appendix A, *infra*, pp. 1a-24a. The opinion of the District Court is reported at 267 F. Supp. 356 (1967) and is set forth in Appendix B, *infra*, pp. 25a-67a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered December 6, 1967. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254 (1).

Question Presented

At a hearing to be held at district headquarters before a District Superintendent of the New York City public schools a decision was to be made whether to continue the suspension of a pupil indefinitely, return him to school, transfer him to an educationally inferior school for disorderly students, or take action leading to institutionalization. Petitioners' retained attorney from Mobilization for Youth, Inc., a government funded anti-poverty program, was excluded from this proceeding pursuant to a regulation of the board of education which permits a student and his family to appear with an assistant of their choice as long as the assistant is not an attorney.

Have petitioners been denied due process of law in violation of the Fourteenth Amendment?

Constitutional Provisions, Statutory Provisions, and Regulations Involved

This petition involves the Fourteenth Amendment to the Constitution of the United States.

This petition also involves New York Education Law §§ 3212, 3214, and New York Family Court Act §§ 312, 332, which are printed in the Appendix, *infra*, pp. 55a-58a.

This case also involves New York City Board of Education General Circular No. 16 which is printed in Appendix C, *infra*, pp. 68a-77a.

Statement

For the main thrust of the attack on poverty on the lower East Side, New York City relies on Mobilization for Youth, Inc. (MFY). MFY is a government funded anti-poverty organization that attempts to provide comprehensive social services on a neighborhood basis. It employs lawyers, social workers, as well as other technical personnel, in a variety of educational and training programs to cope with the dilemmas of the community. MFY's Legal Services Unit is an integral part of the attempt to deal with the social ills the neighborhood faces.

To represent indigent clients, the Legal Services Unit has obtained the approval of the Legal Aid Committee of the Association of the Bar of the City of New York and the permission of the Appellate Division of the Supreme Court of New York, as required by Section 280 of the New York Penal Law. The unit has received funds from the Federal Government and the Ford Foundation. MFY

received its first grant to set up the Legal Services Unit from the federal Office of Juvenile Delinquency and Youth Development in November of 1963. The unit was in operation by January 1964. It is generally recognized that "[T]he Legal Services Unit was the first successful project of its kind in the country" and the precursor of, and the model for, the neighborhood legal services programs that were later to spring up under the auspices of the Office of Economic Opportunity.[1] The unit was a pioneer in the development of precedent-setting cases which affect large numbers of the indigent and its contributions have been significant in both criminal and civil areas. It has long been known for its concern for the rights of juveniles. For example, it put into operation the nation's first program providing representation for juveniles at the police precinct at the time of arrest.[2] As an important facet of its program, lawyers in the unit work with social workers in a co-ordinated effort to assist community people in resolving their problems.[3]

Manuela Madera, a Puerto Rican mother of four, lives in the MFY area. She does not speak or understand English. In early February, 1967 she and her husband Ramiro were notified by Miss Theresa Rakow, the District Superintendent of New York School District No. 1 that their 14 year old son, Victor, had been suspended from Public School 22, the junior high school in which he was enrolled. Victor was accused of striking a teacher, and was directed

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[1] Office of Juvenile Delinquency and Youth Development, U. S. Department of Health, Education and Welfare, "Neighborhood Legal Services—New Dimensions in the Law" (1966), p. 39.

[2] *Id.* at 38.

[3] *Ibid.*

to appear in Family Court on February 23, 1967 to answer a charge of juvenile delinquency and also to attend a district superintendent's "suspense" hearing or "guidance conference" on February 17, 1967.[4]

The Maderas retained attorneys from the Legal Services Unit of MFY to represent them at both the District Superintendent's hearing and the juvenile delinquency proceedings.[5] When an MFY attorney notified Miss Rakow's office that he would appear at the February 17th suspension hearing, on behalf of the Maderas, he was informed that he would not be permitted to do so pursuant to regulations of the board of education and the superintendent of schools—specifically, General Circular No. 16 (1965-1966) which provides that:

> Inasmuch as this is a guidance conference for the purpose of providing an opportunity for parents, teachers, counselors, supervisors, et al., to plan educationally for the benefit of the child, attorneys seeking to represent the parent or child may not participate (Circular No. 16, *infra*, p. 74a).

Circular No. 16 discusses two kinds of suspensions, the "principal suspense" (meaning by the principal of the school) and the "administrative suspense." Under the principal suspense the school principal can suspend a student from school for no more than five days. The administrative suspense involves more serious school problems and

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[4] A previous board of education Circular on school suspensions (Circular No. 11) had designated this a "suspense hearing". Circular No. 16 modified the name to "Guidance and Conference" but the change is "not substantive in nature". Exhibit A, Annexed to Amended Complaint.

[5] On February 28, 1967, the claim that Victor was a juvenile delinquent was dismissed by the Family Court, 267 F. Supp. at 359.

threatens long term interruption of a child's education. Deliberations and decisions involving administrative suspensions are carried on at a District Superintendent's office after referral by the school principal, and it was from a hearing to consider this latter form of suspension that the MFY attorney was barred. Petitioners have at no time challenged any aspect of the principal suspense as a normal incident of intraschool discipline. Such short term suspensions are no part of this case.

When it became clear that counsel would be barred from the hearing, petitioners' attorneys obtained a temporary restraining order in the district court prohibiting the school officials from proceeding with the hearing unless plaintiffs' counsel could be present and participate. Subsequently, the parties proceeded in the district court with a hearing on petitioners' motion for a preliminary injunction which was consolidated with the trial on the merits. The district court made extensive findings of fact as to the nature of the hearing and what was at stake for the pupil and parents involved, and permanently enjoined school officials from holding "administrative suspense" hearings from which attorneys were excluded.

The district court found that at the conclusion of the District Superintendent's hearing, the school authorities made decisions of very serious consequence for the child. The District Superintendent decides whether to return the student to the school in which he is enrolled, transfer him to another school, or require him to continue under suspension. Some students under suspension were deprived of schooling for as much as ten months. The court found that in many cases the indefinite prolonged suspensions resulting from the District Superintendent's hearing were the equivalent of expulsions, 267 F. Supp. at 369. School

records indicated that following a District Superintendent's hearing some students who were beyond the school leaving age were "discharged" or released by school authorities, Court's Exhibits 1-17.

In addition, the court found that the District Superintendent could have the pupil transferred to one of New York's special day schools for "socially maladjusted" children—popularly known as "600" schools because of their former numerical designations. The district court, on the basis of expert testimony, found that the "600" schools were an inferior, ethnically segregated class of schools and that a social stigma attached from placement in one of them. While under the New York statutory scheme a child cannot be placed in one of these special schools without parental "consent," the district court dismissed such consent as wholly illusory since the same New York statute also requires that should the parents refuse to give their consent in writing they "shall" be proceeded against for violating their statutory duty to see to the pupil's attendance at school, N. Y. Educ. Law §§ 3214-5(a), 3214-5(c).

In addition to these immediate dispositions at the conclusion of the hearing, the District Superintendent can make referrals of the pupil which have significant educational consequence. The Bureau of Child Guidance (BCG) may determine that a student requires medical suspension, home instruction or exemption from school attendance. The Bureau of Attendance to which a referral may also be made, may proceed with court action. "In the latter instance, school personnel will make themselves available for testimony in court" (Circular No. 16, *infra*, p. 75a).[6]

[6] Both the district court and court of appeals were dubious of the admissibility of any statements made at the hearing in a subsequent

Such referrals may result in institutional placement. The New York City Board of Education runs schools in a large number of residential institutions and hospitals and school officials have the authority to order a student found to be habitually truant, irregular in attendance, "insubordinate" or "disorderly" to be instructed "under confinement" for a period of up to two years, N. Y. Educ. Law §§ 3214-1; 3214-5a. As in the case of the "600" school, parents who refuse to accept the "recommendation" of institutional placement are faced with the threat of court action.[7] The district court found that these "serious consequences", made the exclusion of attorneys from a school suspension hearing a violation of the Due Process Clause of the Fourteenth Amendment. The court permanently enjoined school officials from enforcing the "no attorneys" provision in their regulation relating to the suspension of children attending public school.

On appeal, the court of appeals for the Second Circuit reversed, vacated the injunction, and dismissed the com-

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court proceeding. However, neither court doubted that the *disposition* of the guidance conference is admissible in a subsequent court action. Section 334 of the Family Court Act, cited by the court of appeals as barring statements made in a "preliminary conference" from an adjudicatory Family Court hearing or criminal action seems only to apply to a preliminary conference in the Family Court action, and has no reference to conferences of other agencies for other purposes—such as a school guidance conference. The district court based its doubt on admissibility upon *Garrity* v. *New Jersey*, 385 U. S. 493 (1967). What a Bureau of Attendance officer could validly report in a subsequent court action concerning the proceedings in a guidance conference is not clear.

[7] Adamant parents who refuse to consent and find themselves in Family Court defending a neglect charge do have the benefit of counsel and the airing of the issues in a judicial tribunal (Family Court Act, § 343). However, those parents who are intimidated by the threat of a neglect proceeding unwillingly "consent" to their child's institutional placement.

plaint. The appellate court did not share the view of the district court as to the seriousness of the consequences of the District Superintendent's hearing. It expressed the view that "the rules, regulations, procedures and practices disclosed on this record evince a high regard for the best interest and welfare of the child." The court was of the opinion that "law and order in the classroom should be the responsibility of our respective educational systems"; that due process of law does not require the presence of counsel; and that a social worker who is allowed to attend the hearing "would provide more adequate counsel to the child or parents than a lawyer," 386 F. 2d at 788.

How the Federal Question Was Raised and Decided Below

The question of whether in a school suspension hearing which threatened loss of liberty and the right to public education the parents and child involved were entitled to an assistant of their choice was raised throughout proceedings in the district court. 267 F. Supp. at 362. The district court decided that the "no attorneys" provision of board of education Circular No. 16 violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

On December 6, 1967, the United States Court of Appeals for the Second Circuit reversed the district court holding that the regulation of the board of education excluding attorneys did not violate the Due Process Clause of the Fourteenth Amendment. 386 F. 2d at 789.

REASONS FOR GRANTING THE WRIT

I.

The restriction on the role of the lawyer in this case raises an issue of national importance in that it severely impairs effective protection of the legal rights of the poor.

This case involves Victor Madera, a 14 year old Puerto Rican youth who was suspended from school for allegedly striking a teacher. He and his parents were summoned to appear before district school officials for a hearing to determine Victor's educational future. The family secured the assistance of an attorney with Mobilization for Youth, Inc., a neighborhood anti-poverty organization, but when the attorney sought to participate at the hearing he was informed that attorneys are excluded by board of education policy.

The question here is whether consistent with the Fourteenth Amendment Due Process Clause a board of education may bar an attorney from a proceeding at the school district level which will have profound consequences for the future of a public school student, although any non-attorney advisor may be present. The court of appeals upheld the exclusion of counsel because of what, petitioners submit, is a dangerous misconception of the lawyer's role and the nature of the proceeding at which his assistance was sought. Its decision is at odds with national efforts to provide the poor with legal resources necessary to protect their rights to procedural due process and their ability to obtain fair treatment from government officials.

Recent years have witnessed increased concern for the legal rights of the poor and a growing awareness of the need to provide legal services to enable them to protect themselves. This interest has been stimulated by and reflected in decisions of this court,[8] federal legislation,[9] national conferences,[10] and a burgeoning legal literature.[11] One of the most significant contributions to providing legal services for the poor has been the creation of local legal services projects under the federal Office of Economic Opportunity (OEO). The growth and proliferation of these neighborhood legal services projects evinces a strong national commitment to providing the poor with the resources necessary to cope with modern bureaucratic society.

This commitment reaches far beyond representation of the criminally accused. Indeed, federally funded legal ser-

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[8] *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Griffin* v. *Illinois*, 351 U. S. 12 (1956); and *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964); *NAACP* v. *Button*, 371 U. S. 415 (1963); *United Mine Workers of America, Dist. 12* v. *Illinois State Bar Association*, 389 U. S. 217 (1967).

[9] E.g., the Economic Opportunity Act of 1964, 78 Stat. 508, and the Criminal Justice Act of 1964, 78 Stat. 552, 18 U. S. C. § 3006 A.

[10] E.g., National Conference on Law and Poverty, Washington, D. C., June 23-25, 1965, under the Co-Sponsorship of the Attorney General and the Director of the Office of Economic Opportunity; The Extension of Legal Services to the Poor, Washington, D. C., November 12, 13, 14, 1964, under the Sponsorship of the U. S. Department of Health, Education and Welfare; National Conference on Bail and Criminal Justice, Washington, D. C., May 27-29, 1964 under the Co-Sponsorship of the U. S. Department of Justice and the Vera Foundation.

[11] See e.g., Symposium: Law of the Poor, 54 Calif. L. Rev. 319-1014 (1966); Bibliography of Selected Readings in Law and Poverty, in Conference Proceedings, National Conference on Law and Poverty (1965).

vice to the poor offices may not now handle criminal cases.[12] And, in fact, lack of legal protection in the criminal area constitutes only a small part of the vulnerability of the poor.[13]

Neighborhood lawyers serving the poor are taking on more than the traditional tasks of courtroom representation. They are instrumental in educating their clients to the fact that the machinery of government is intended for their use—that the law can work for the poor as well as against them.[14] They serve as negotiators for the commu-

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[12] §222 of Economic Opportunity amendments of 1967, 81 Stat. 672.

[13] As the Attorney General of the United States observed in 1964:

> In the final analysis, poverty is a condition of helplessness—of inability to cope with the conditions of existence in our complex society. We know something about that helplessness. The inability of a poor and uneducated person to defend himself unaided by counsel in a court of criminal justice is both symbolic and symptomatic of his larger helplessness.
>
> But we, as a profession, have backed away from dealing with that larger helplessness. We have secured the acquittal of an indigent person—but only to abandon him to eviction notices, wage attachments, repossession of goods and termination of welfare benefits . . . it is time to recognize that lawyers have a very special role to play in dealing with this helplessness. And it is time we filled it.
>
> Some of the necessary jobs are not very different from what lawyers have been doing all along for government, for business, for those who can pay and pay well.

Attorney General Robert F. Kennedy, Law Day Address, May 1, 1964, University of Chicago Law School, quoted in Cahn and Cahn, "The War on Poverty: A Civilian Perspective," 73 Yale L. J. 1317, 1336-1337 (1964).

[14] See generally Comment, "Neighborhood Law Offices: The New Wave in Legal Services for the Poor," 80 Harv. L. Rev. 805 (1967); Office of Economic Opportunity, The Poor Seek Justice (1967); Office of Economic Opportunity, First Annual Report of the Legal Services Program to the American Bar Association (1966); United States Department of Health, Education and Welfare, Conference Proceedings: The Extension of Legal Services to the Poor (1964); Office of Economic Opportunity, National Conference on Law and Poverty (1965).

nity with governmental agencies not merely in litigation, but on the administrative level with respect to welfare assistance, public housing, and myriad other public benefits.[15] The neighborhood lawyer performs functions which would not necessarily require a lawyer in educated middle class communities.[16]

The court of appeals rejected petitioners' demand to be represented in a serious matter by a neighborhood Legal Service attorney at an administrative hearing on the ground that the petitioners' best interests were not served by representation by an attorney. This ruling unjustifiably denigrates the role of all attorneys in providing the requisites of due process whether they represent rich or poor.

If a poor, non-English speaking person's right to be heard is to be at all effective it must include the right to be heard through an assistant of his own choosing. Petitioners do not claim that in every instance where a public benefit is put in jeopardy, the individual concerned is entitled to representation by counsel as a matter of constitutional right. This would be too rigid a response to a problem that must be approached by a variety of means serving a number of ends. But petitioners do claim that

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[15] See, Sparer, "The Welfare Client's Attorney," 12 U. C. L. A. L. Rev. 361 (1965); Carlin and Howard, "Legal Representation and Class Justice," 12 U. C. L. A. L. Rev. 381 (1965); Reich, "The New Property," 73 Yale L. J. 733 (1964); Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 Yale L. J. 1245 (1965); Handler, "Controlling Official Behavior in Welfare Administration," 54 Calif. L. Rev. 479 (1966).

[16] Often we are blinded to the efficacy of legal representation as a potential route to a desired result because other modes of communication, organization, pressure, and protest suffice—at least for the *middle class*. Cahn and Cahn, "The War on Poverty: A Civilian Perspective," 73 Yale L. J. 1317, 1344 (1964). (Emphasis supplied.)

when a citizen has someone available to assist him in dealing with public authorities, concerning matters of vital personal interest, that person should not be barred, as the board of education's regulation requires, solely because he happens to be a lawyer. It is an arbitrary and irrational distinction, which if given widespread application will seriously undermine the attempts now being made to enable the law to serve the poor as well as it serves the rich.

Some of the students indefinitely suspended as a result of the District Superintendent's hearing become dropouts, adding to the flood of unemployed indigent youth in our cities—and to the social problems attendant to such a flood. As former Secretary for Health, Education and Welfare Gardner has stated: "the schools have been all too willing to unload their behavior and scholastic problems on the community in the form of dropouts or expelled students." [17] In all these cases the child was faced with a system which denied him the assistance of counsel when faced with accusations by the established authorities.

Few rights could be of more importance to a maturing youth than his right to an education and thus the procedures which put this valuable right in jeopardy must comport with our fundamental notions of fairness.[18] Thus, although this petition raises only a narrow question of law, that question is of substantial public importance.

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[17] *Time*, January 20, 1967, p. 18.

[18] Increasingly, the city schools are becoming institutions for our poor and ethnic minorities, run by staffs that are middle class and white. On matters of group values and argot there are tremendous chasms of understanding. See, e.g., Kozol, Death at an Early Age; Kohl, 36 Children; Hentoff, Our Children Are Dying. The neighborhood lawyer, lately arrived as the tribune of the poor, can be of great value in bridging some of these chasms and establishing genuine communication. In some neighborhoods he may be the only one capable of doing so.

II.

Certiorari should be granted to decide whether due process of law is denied by a school suspension hearing from which the parents and child involved are denied the assistance of a person of their own choosing.

The district court and the court of appeals differed as to what due process requires. The divergence flows from disparate views as to the nature of the hearing held by school authorities and the seriousness of its consequences. To the court of appeals the hearings are innocuous "conferences"—preliminary investigations in which "[T]he most that is involved is a change of school assignment." 386 F. 2d at 783. Its view of the nature of the hearing is based in large part on an affidavit of the superintendent of schools.[19] The language of the affidavit is reminiscent of that of a pre-*In Re Gault*, 387 U. S. 1 (1967) description of the purposes and procedures of a juvenile court attempting to justify why due process should not apply.

In the *Gault* case this Court found that there was a definite "gap between rhetoric and reality" in the juvenile court system, 387 U. S. at 30. After observing and listening to extensive testimony from parents, social workers, and educational experts who had actually been involved in suspension hearings, the district court came to a similar

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[19] 386 F. 2d at 782. "The conference is conducted in an atmosphere of understanding and cooperation, in a joint effort involving the parent, the school, guidance personnel and community and religious agencies. There is never any element of the punitive, but rather an emphasis on finding a solution to the problem." Though he recites the theory of the "Guidance Conference" in detail, there is no indication in the record that the Superintendent of Schools has even ever attended a suspense hearing or "Guidance Conference."

conclusion about the harsh reality of New York City suspension hearings. Not only did the district court refuse to accept the benign description of the ambience and procedures put forward by school officials, but it differed with them as to the seriousness of the consequences of such hearings. As a direct result of the District Superintendent's conference a child may be returned to a regular public school setting or he may be suspended indefinitely. The district court found that some children are kept out of school the equivalent of an entire school year—or longer, 267 F. Supp. at 371. Despite the child's right to an education under New York law, in most cases of prolonged, indefinite suspension, there is no home instruction or alternative form of education offered by the school authorities. The youth who attains the school leaving age while on suspension and who was sceptical about the value of an education has little incentive to return to the classroom. Others who have passed the school leaving age are simply released or "discharged," by school officials. Under these circumstances, the district court properly viewed these prolonged indefinite suspensions as the "functional equivalent" of expulsion, 267 F. Supp. at 369.

Another direct consequence of the hearing is possible placement in a "600" school or "school for socially maladjusted children." To characterize this disposition as a mere "change of school assignment," as did the court of appeals, is unjustifiable in the face of both oral testimony and the written report of an educational expert, hired by the board itself to make a study of the "600" schools, to the effect that these schools are "ethnically segregated, inconveniently located, undersupported, organizationally unstable and unable to meet the needs of its student body." Dr. Bernard Mackler, "A Report on the '600' Schools: Di-

lemmas, Problems and Solutions," pp. 4-5. In short, as a consequence of a District Superintendent's hearing a child risks the educational disadvantage (as well as social stigma) that comes from placement in inferior schools operated for misfits. School officials must obtain parental consent before placing a child in such a special day school, N. Y. Education Law § 3214-5(a), but the statute also provides that should the parents fail to consent in writing, they "shall" be proceeded against for neglect, § 3214-5(c)(1). Such consent, as the district court found, is wholly illusory and lacks those elements of voluntariness recognized as "consent" in law. Cf., *Johnson* v. *Zerbst,* 304 U. S. 458 (1938).

Both the district court and the court of appeals agreed that these consequences result from the District Superintendent's hearing—they differed as to their seriousness. It is clear, therefore, that the hearing is not merely a preliminary investigatory procedure but rather an accusatory-adjudicatory proceeding in which, as required by Circular No. 16, "findings" and a "decision concerning the disposition of the case" are made. General Circular No. 16, *infra,* p. 75a.

As a result of the hearing or "guidance conference" the District Superintendent may also refer the student's case to the Bureau of Child Guidance or other agencies for study and recommendation, or to the Bureau of Attendance for court action. Such referrals to the BCG or related agencies may result in institutional placement. As in the case of the "600" school, parents who refuse to accept the "recommendation" of institutional placement are faced with the threat of court action, N. Y. Education Law §§ 3214-5(a); 3214-5(c). Parents who are coerced by this

threat find their children institutionalized without further opportunity for a hearing. There may be further investigations and decisions after a referral by the District Superintendent to the BCG, see 386 F. 2d at 785, but there is *no subsequent opportunity for a hearing.*[20] *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 152-53 (1941).

While the court of appeals concluded that the consequences of the hearing would be "limited" it conceded that "any action that would effectively deny an education must meet the minimal standards of due process" within the meaning of the Fourteenth Amendment. 386 F. 2d at 784. The court considered the question of whether due process permits exclusion of retained counsel on this basis and rejected petitioners' contention on the grounds that the right to representation is not an essential ingredient of a fair hearing.

If the Maderas' right to be heard is, however, to be more than a hollow formality, they must be permitted to be heard by and through an assistant of their own choosing—including the neighborhood lawyer. More than three decades ago, this Court observed, concerning both *civil* and criminal matters that

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated

[20] The only exception, of course, would be where the parent and child are proceeded against in Family Court for refusal to comply with board of education school requirements, in which case they would be assured of proper procedural safeguards including counsel, Family Court Act § 343.

Thus, contrary to the court of appeals' disclaimer (386 F. 2d at 788) the question of what due process requires before a child is expelled from school or sent to a special day or residential school was before the court.

> layman has small and sometimes no skill in the science of law . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Powell* v. *Alabama*, 287 U. S. 45, 68-69 (1932).

It is erroneous to conclude that the language of *Powell* is irrelevant, as did the court of appeals, because school suspension hearings do not involve "cases" or "courts." If a tribunal—no matter what it is called—is able to make factual findings, adjudicate issues, and impose serious disabilities then for purposes of aid to the uneducated layman, we have both a "case" and a "court." It is ironic that if the City of New York, or any other party, sued the Maderas for the smallest sum of money, no one would question their right to the assistance of retained counsel. New York Const. Art. I § 6.

The poor parents and child who leave the school setting and come to the bureaucratic headquarters downtown for a hearing are faced with a formidable array of authorities and experts, who know each other, speak well, are at ease in the hearing room, and who proceed to determine what is in their view best for the child's future on the basis of what is alleged to have been his conduct in the past. A rule excluding lawyers, while allowing all others, is not only arbitrary, capricious, and irrational in its classifica-

tion, but prevents parents and children from having the assistance of members of a profession especially well suited for dealing with this type of hearing. Lawyers have a special skill in being able to devise satisfactory resolutions when many competing values and interests are at stake—a skill which school officials concerned with the best welfare of a child should welcome.

The concern of the court of appeals that the mere presence of a lawyer in their midst would be destructive of the purposes of the hearing is ill-founded. Due process does not require a full scale judicial hearing. A lawyer at such hearings would be limited by reasonable rules established by the school authorities. But within this framework, the lawyer has a valuable contribution to make—certainly as much as the parents' social worker, priest, or other adviser, all of whom could have been present at the Madera hearing, while their lawyer would be barred. Should an attorney stray outside this framework, he would be subject to the same reasonable controls that the board could exercise over other types of advisers.

The opinion of the court of appeals denigrates the role of the lawyer. Not only does it unjustifiably elevate the effectiveness of the social worker over that of an attorney, but it suggests that a lawyer in this situation would be little more than a "destructive" pettifogger—quick with quibbles and legal niceties to clog the machinery of the hearing, but with little positive contribution to make. On the contrary, an attorney has the best interest of the child, his client, at heart—as much as do school officials. He is trained to seek creative ways to resolve the problems at hand, maximizing alternatives and offering suggestions that might not have occurred to the school authorities, but which

would be acceptable to all involved. This has been the experience of attorneys in other parts of New York State where there is no bar to attorney participation in school hearings, as was reported by an *amicus curiae* brief filed in the court of appeals by the Nassau County Legal Services Corporation, another O.E.O. Legal Services office which regularly represented children before school boards.

The mere presence of a lawyer would at the same time provide an assurance of regularity and fairness in the proceedings. The superintendent of schools in his affidavit filed with the answer to the complaint in this action expressed his opposition to the presence of an attorney as follows:

> "The attorney might assert that the improper acts of the pupil did not occur, or that the nature of the act has been exaggerated, or he might seek to establish extenuating circumstances." [21]

If appropriate and valid, all of these things an attorney might and *should* do. Objections to an attorney's presence cannot fairly be bottomed upon such considerations for the hearing officials are under an obligation to hear the child's version of the events and anything he has to say by way of explanation. The board's practice of assuming the correctness of the accumulation of reported incidents on the child's anecdotal record, see, 386 F. 2d at 788, does not "evince a high regard for the best interest and welfare of the child" 386 F. 2d at 789. If this evidence is important for the decision in the child's case, it should be subjected, within reasonable limits, to examination, criticism, and refutation. There is no irrebuttable presumption of accuracy attached to staff reports. Cf., *Kent* v. *United*

[21] Affidavit of Bernard E. Donovan, Superintendent of Schools.

States, 383 U. S. 541, 563 (1966); *Hannah* v. *Larche*, 363 U. S. 420, 489 (1960).

The authorities relied upon by the court of appeals do not support denial of counsel to petitioners. *In re Groban*, 352 U. S. 330 (1957) and *Anonymous* v. *Baker*, 360 U. S. 287 (1959) are inapposite. *Groban*, a 5-4 decision, held that a state could constitutionally deny a *witness* a right to counsel at an *investigatory* hearing. Application of this holding to the instant case is highly dubious since (1) the Maderas are not witnesses, but principals and (2) this is an adjudicatory, not an investigative hearing. Furthermore, the pillars which supported *Groban* have been removed for the objection to exclusion of counsel was that it impaired the privilege against self-incrimination. At the time the privilege was *not* protected against state action by the due process clause, *Malloy* v. *Hogan*, 378 U. S. 1 (1964).[22]

The court of appeals mistakenly read *Dixon* v. *Alabama Board of Education*, 294 F. 2d 150 (5th Cir. 1961), cert. denied, 368 U. S. 930 (1961), as supporting the exclusion of attorneys at a school expulsion hearing. *Dixon* discussed the procedural rights deemed necessary in such hearings

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[22] Nor should the draft board cases, *United States* v. *Sturgis*, 342 F. 2d 328 (3rd Cir. 1965); *Niznik* v. *United States*, 173 F. 2d 328 (6th Cir. 1949); *United States* v. *Pitt*, 144 F. 2d 169 (3rd Cir. 1944), cited by the court of appeals, 386 F. 2d at 787, be in anyway dispositive of the issues in this case. This Court has never passed upon the constitutionality of the Selective Service rule excluding counsel at draft board hearings. What is more, these hearings do not involve conduct that is cognizable in the criminal or juvenile courts or determinations that result in any immediate deprivation. Significantly, the Selective Service System provides registrants with legal advisors who, although they deal principally with appeals, are generally charged with assisting the registrant in the protection of his rights. Selective Service Regulation 1604.71 (d). There is no such analogue in the New York City school system.

but was silent on the question of the presence of counsel. It was concerned mainly with the issues of notice and the right to be heard. There is nothing in *Dixon* standards to indicate that a student exercising his right to be heard, would be barred from the assistance of an attorney of his own choosing at the hearing.[23]

We emphasize that to permit a lawyer under a rule that permits all other manner of advisors to be present and participate at the hearing at the District level is not to require one in all instances. The burden on the board of education of allowing a person to appear by counsel when one is available is nil. If denied the assistance of a neighborhood lawyer, however, the Maderas of our cities are at a serious disadvantage before administrative bodies. The New York City board of education regulation barring only attorneys from District school suspension hearings where valuable rights are in jeopardy is an arbitrary rule which prejudices the right to be heard guaranteed by the Due Process Clause of the Fourteenth Amendment.

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[23] The Second Circuit Court of Appeals has itself recognized that the presence of counsel "as an ingredient of fairness is a function of all other aspects of the hearing"—including the maturity and education of the individual involved. *Wasson* v. *Trowbridge*, 382 F. 2d 807, 812 (2d Cir. 1967).

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 502—September Term, 1966.

(Argued June 8, 1967 Decided December 6, 1967.)

Docket No. 31346

VICTOR MADERA, RAMIRO MADERA and MANUELA MADERA,

Plaintiffs-Appellees,

APPENDICES

BOARD OF EDUCATION OF THE CITY OF NEW YORK, BERNARD E. DONOVAN, as Superintendent of Schools of the City of New York, THERESA S. RAKOW, as District Superintendent for District One in the City of New York,

Defendants-Appellants.

Before:

MOORE, FRIENDLY and ANDERSON,

Circuit Judges.

Appeal from an order entered on April 13, 1967, in the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*, enjoining appellants from conducting a District Superintendent's Guidance Conference to consider the situation of a child suspended for disciplinary reasons without affording the child and his parents the right to be represented by legal counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS

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VICTOR MADERA, RAMIRO MADERA and MANUELA MADERA,

Plaintiffs-Appellees,

—against—

BOARD OF EDUCATION OF THE CITY OF NEW YORK, BERNARD E. DONOVAN, as Superintendent of Schools of the City of New York, THERESA S. RAKOW, as District Superintendent for District One in the City of New York,

Defendants-Appellants.

Before:

MOORE, FRIENDLY and ANDERSON,

Circuit Judges.

Appeal from an order entered on April 11, 1967, in the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge,* enjoining appellants from conducting a District Superintendent's Guidance Conference to consider the situation of a child suspended for disciplinary reasons without affording the child and his parents the right to be represented by legal counsel.

Opinion reported, 267 F. Supp. 356 (S. D. N. Y. 1967). Judgment reversed; injunction vacated and complaint dismissed.

JOHN J. LOFLIN, Office of the Corporation Counsel, City of New York (J. Lee Rankin, Corporation Counsel, and Luis M. Neco, of counsel), *for defendants-appellants.*

ROBERT SUGARMAN, New York, N. Y. (Harold J. Rothwax and Sue Ann Shay, New York, N. Y., on the brief), *for plaintiffs-appellees.*

DAVID I. ASHE, ROBERT CARTER, WILLIAM CHISHOLM, KENNETH W. GREENAWALT, DAVID HABER, HERBERT A. HEERWAGEN, RHODA H. KARPATKIN, WHITMAN KNAPP, RICHARD L. LEVINSON, LEAH MARKS, STEPHEN M. NAGLER, BURT NEUBORNE, GREGORY J. PEBRIN, CARL RACHLIN, GEORGE SCHIFFER, WILLIAM A. WHITE, and RAY H. WILLIAMS, New York, N. Y. (Rhoda Karpatkin, Leah Marks, Carl Rachlin, Stephen M. Nagler, of counsel), *for American Jewish Congress, New York Metropolitan Council, et al., as amici curiae.*

JOHN DEWITT GREGORY, Mineola, N. Y. (Allen Redlich, Syosset, N. Y., of counsel), *for Nassau County Law Services Committee, Inc., as amicus curiae.*

LUBELL AND LUBELL, New York, N. Y. (Jonathan W. Lubell and Stephen L. Fine, New York, N. Y., of counsel), *for New York City Chapter of the National Lawyers Guild as amicus curiae.*

ROBERT PROJANSKY, New York, N. Y., *for Harlem Social Workers' Action Committee as amicus curiae.*

VLADECK, ELIAS, FRANKLE, VLADECK & LEWIS, New York, N. Y. (Max H. Frankle, Everett E. Lewis, and Zachary Wellman, New York, N. Y., of counsel), *for Council of Supervisory Associations as amicus curiae.*

MOORE, *Circuit Judge*:

On February 2, 1967, plaintiff, Victor Madera, was a 14-year-old student in the seventh grade in Junior High School No. 22, District No. 1 of the New York City public school system. On that date, after a period of more than a year of behavioral difficulties, Victor was suspended from school by the principal. Victor's principal notified the District Superintendent of District No. 1, Miss Theresa Rakow, of the suspension. Miss Rakow notified Victor's parents, requesting their presence at a Guidance Conference to be held in her office on February 17, 1967, with regard to Victor's suspension.

After Victor's parents received the notice, they sought the aid of legal counsel who wrote to Miss Rakow asking to appear on behalf of Mr. and Mrs. Madera and their son at the conference. Miss Rakow's office advised the attorney that he could not attend the conference. General Circular No. 16 (1965-1966), promulgated by the Board of Education of the City of New York and the Superintendent of Schools, provides:

> "Inasmuch as this is a guidance conference for the purpose of providing an opportunity for parents, teachers, counselors, supervisors, et al., to plan educationally

for the benefit of the child, attorneys seeking to represent the parent or child may not participate" (page 5).

On February 16, 1967, the Maderas sought and obtained a temporary restraining order from the district court, restraining appellants:

> "From holding any proceeding at which the plaintiffs may be affected and, particularly, from conducting the 'Assistant Superintendent's Hearing' scheduled for February 17, 1967, without permitting plaintiffs' legal counsel to be present and to perform his tasks as an attorney."

After a trial, the district court issued a permanent injunction and held that "the right to a hearing as a due process requirement [is] of such constitutional significance as to void application of defendants' 'no attorneys provision' to the District Superintendent's Guidance Conferences." 267 F. Supp. at 373. Defendants, the Board of Education, have appealed the issuance of that injunction. Pending the decision of the appeal, this Court on May 1, 1967, granted a stay.

At the very outset it should be made clear what this case does *not* involve. First, the Guidance Conference is not a criminal proceeding; thus, the counsel provision of the Sixth Amendment and the cases thereunder are inapplicable. Second, there is no showing that any attempt is ever made to use any statement at the Conference in any subsequent criminal proceeding. The record is to the contrary (186-87),[1] and the district court so found, 267

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1 The numbers refer to pages of the stenographer's minutes of the trial.

F. Supp. at 372. Therefore, there is no need for counsel to protect the child in his Fifth Amendment privilege against self-incrimination.

The issue is one of procedural "due process" in its general sense, free from the "specifics" of the Fifth and Sixth Amendments. What constitutes due process under any given set of circumstances must depend upon the nature of the proceeding involved and the rights that may possibly be affected by that proceeding. *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 895 (1961). Thus, it will be necessary to describe the nature and purpose of the District Superintendent's Guidance Conference in some detail.

Article XI, Section 1 of the New York Constitution states that "the legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." In New York, a person over five and under twenty-one is "entitled" to attend the free public schools in the school district or city in which he resides. §3202(1), New York Education Law. Attendance at school is a statutory requirement for minors between the ages of seven and sixteen. §3205(1), Education Law.

The suspension of a pupil who is insubordinate or disorderly or who endangers the safety or morals of himself or other minors, is authorized by section 3214(6) of the Education Law.[2] There are two kinds of suspensions, the

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2 Section 3214-6 provides:

6. Suspension of a minor. a. The school authorities, the superintendent of schools, or district superintendent of schools may suspend the following minors from required attendance upon instruction:

(1) A minor who is insubordinate or disorderly;

(2) A minor whose physical or mental condition endangers the health, safety, or morals of himself or of other minors;

(continued on following page)

"principal suspense" (meaning by the "principal" of a school) and the "administrative suspense." Under the principal suspense the school principal has the authority to suspend the child from classes for a period of no more than five days. Generally, the principal tries to meet with the parents of the child to try to solve the problem before the suspension, but sometimes the situation requires an immediate suspension with a later conference before the child is returned to school. Normally, a principal suspense does not require any consideration by the District Superintendent (168-170).

If the principal feels that a simple suspension will not solve the problem, he may suspend the child and refer the suspension to the District Superintendent. This is what is referred to as an "administrative suspense," a suspense which remains in effect pending an administrative decision. Section 3214(6)(b) vests the responsibility for dealing with the suspended child with the District Superintendent. There is no statutory requirement that a parent be granted a hearing prior to invoking this power. *Cosme* v. *Board of Education,* 50 Misc. 2d 344, 270 N. Y. S. 2d 231 (1966), affirmed without opinion, 27 App. Div. 2d 905 (1st Dept. 1967). Section 3214-5(a) requires only that a hearing be held prior to sending a child to a special day school or to confinement. However,

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(3) A minor who, as determined in accordance with the provisions of part one of this article, is feebleminded to the extent that he cannot benefit from instruction.

b. Procedure after suspension. In the case of a minor who is suspended as insubordinate or disorderly, immediate steps shall be taken for his commitment as provided in this section, or for his attendance upon instruction elsewhere; in the case of a minor suspended for other cause, the suspension may be revoked whenever it appears to be for the best interest of the school and the minor to do so.

pursuant to procedure promulgated by the Board of Education of the City of New York and the Superintendent of Schools and distributed in General Circular No. 16, hearings, or "Guidance Conferences," relating to the suspension are held in all cases. The principal, after suspending the student, notifies the parents that a conference will be held and the District Superintendent's office notifies them of the date of the conference.

In attendance at the Guidance Conference are the child and his parents, the principal, the guidance counselor of the suspended child's school, the District Superintendent, her assistant, the guidance counselor assigned to her office, and the school-court coordinator assigned to the district. If the parents do not speak English, they may bring an interpreter with them or one will be provided. In addition to his parents, the suspended child may have a representative from any social agency to whom the family may be known, attend the Guidance Conference. Students and their parents have never been represented at any of these Conferences by counsel (184-85).

The function of the school-court coordinator is to provide a liaison between the Family Court and the schools. He interprets to the court "the program and facilities" of the school and he "interprets to the school the decisions of the court and the recommendations of the courts" (171). In some cases the Family Court may make use of the District Superintendent's decision at the Guidance Conference, and when requested to do so by the court, it is the school-court coordinator who takes this information to the court. In such a case, the court would receive only the school record of the child containing the fact that the child had been suspended and some notation as to where he had been transferred or where he had been placed

after the suspense (355-56). Apparently as a matter of convenience, the school-court coordinator will also take notes at the Guidance Conference (180). However, it is clear that no statements made during such a preliminary conference could be admitted into evidence at any adjudicatory hearing before the Family Court. Section 334 of the Family Court Act provides that "No statement made during a preliminary conference may be admitted into evidence at an adjudicatory hearing under this act or in a criminal court at any time prior to conviction."[3]

The District Superintendent's guidance counselor coordinates the activities of the District Superintendent's office with the Bureau of Child Guidance. The guidance counselor takes notes and keeps records of the Guidance Conference. When the child returns from suspension, the guidance counselor helps to place him in the proper school situation (172).

At the Guidance Conference it is made clear to the parents and the child that it is not intended to be punitive, but it is, rather, an effort to solve his school problems. Each one present, including the child if he is old enough, is asked what he thinks should be done and contributes to the discussion. Sometimes either the parents or the child will be asked to step outside for a moment so that one might discuss problems that would be difficult to discuss in front of the other (173-74).

> "The sole purpose of the conference is to study the facts and circumstances surrounding the temporary suspension of this student by his school principal, and to place the child in a more productive educational

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3 Parenthetically, it may be noted that in the Family Court where a charge of juvenile delinquency was made by a teacher, Victor was represented by counsel, a right given by section 728 of the New York Family Court Act.

situation. At these conferences the assistant superintendent interviews the child, his parents and school personnel to learn the cause of the child's behavior. The conference is conducted in an atmosphere of understanding and cooperation, in a joint effort involving the parent, the school, guidance personnel and community and religious agencies. There is never any element of the punitive, but rather an emphasis on finding a solution to the problem.

"After full and careful study and discussion a plan is formulated to deal more adequately with the problems presented by the child. Every effort is bent towards the maintenance of a guidance approach. The emphasis is on returning the child as rapidly as possible to an educational setting calculated to be most useful to him."[4]

At the very beginning of the conference, the District Superintendent's staff may gather to go over the school records and background of the case before the parents and child arrive, but the parents are asked what they think should be done with the child and "no decision is made until the parent and child have participated" (303).

It is important to note that there are only three things that can happen to a student as a direct result of the District Superintendent's conference:

1. The suspended child might be reinstated in the same school, in the same or a different class, or

2. The suspended child might be transferred to another school of the same level, or

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4 Affidavit of Bernard E. Donovan, Superintendent of Schools.

3. The suspended child—but only with the parents' consent—might be transferred to a special school for socially maladjusted children (Gen. Circular No. 16).

Schools for socially maladjusted pupils (formerly known as "600" schools) were established about eighteen years ago. They are schools which are provided with special services for rehabilitation of children who are socially maladjusted or are problem children. These schools have smaller classes, specially trained teachers and special programs. More money is allocated to them so that they are able to provide more equipment and field trips for the children (100-101). There is evidence that these schools are presently inadequate to meet the needs of the New York public school system,[5] but no practical alternative has been offered for educating the disruptive child (445-51). It is undoubtedly true that a certain social stigma attaches to being placed in a school for socially maladjusted children. But this is true of many decisions of educational placement, such as, deciding not to promote a child or to remove him from a rapid advancement class or even the decision to give him a low or failing mark. Furthermore, the only schools for socially maladjusted children to which the District Superintendent could refer a child after a Guidance Conference are those which provide for attendance during regular school hours as in any other school (236). In deciding as to which school to refer the child, an effort is made to reduce any stigma by sending him to a school out of the neighborhood if possible (246).

Thus, aside from a decision that the child should be returned to the school he has been attending, the District

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5 Dr. Bernard Mackler, A Report on the "600" Schools: Dilemmas, Problems, and Solutions (Plaintiff's Exhibit 3).

Superintendent is only authorized finally to decide that the child be transferred to another school. The most that is involved is a change of school assignment. However, after the Guidance Conference, the District Superintendent may also:

4. Refer the student's case to the Bureau of Child Guidance or other social agency for study and recommendation, or

5. Refer the case to the Bureau of Attendance for court action (Gen. Circular No. 16).

If the compulsory school attendance law, §3205, Education Law, is being violated, it is the responsibility of the Bureau of Attendance to take the matter to the Family Court. If, after the guidance conference, the District Superintendent determines that the child should be enrolled in a special school for socially maladjusted children, his parents are told to report to that school with the child. The written consent of the parent or person in parental relation to the child, is necessary before he may be required to attend a school for socially maladjusted children. §3214-5 (a), Education Law. However, if the parents refuse to give such consent they may be prosecuted for violation of the compulsory education laws. §§3214-5(c)(1), 3212-2(b). If the child does not report for admission, the Bureau of Attendance is notified and appropriate action is commenced in the Family Court.

The Bureau of Child Guidance (BCG) is the "clinical arm of the Board of Education. Its employees are social workers, psychologists, and psychiatrists" (175). When the District Superintendent refers a child to the BCG, it makes a study of the child "as seems indicated to help" the District Superintendent or to advise her "of what may be

[the] best educational placement" (176). The BCG has no authority to order a particular placement for a child, but can only recommend various alternatives to the District Superintendent (307-08). What these alternatives are would depend on the individual child but, in general, they are the following:

1. The child is able to attend school but should be sent to a school with a particular kind of program.

2. The child should be sent to a special day school for socially maladjusted pupils or a residential institution where the Board of Education operates such a school.

3. The child should be instructed at home.

4. The child should be temporarily exempted from school while his parents seek institutional help.

5. The child should receive a medical suspension or exemption.

6. The child should be exempt from school (176).

I.

The Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law." Thus it has long been clear that where a government affects the private interest of an individual, it may not proceed arbitrarily, but must observe due process of law. *Wynehamer* v. *People*, 13 N. Y. 378 (1856).

> ". . . The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his

> faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood or avocation and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer* v. *Louisiana,* 165 U. S. 578, 5 (1897).

It has been held that any action that would effectively deny an education must meet with the minimal standards of due process.

> ". . . It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens." *Dixon* v. *Alabama State Board of Education,* 249 F. 2d 150 (5th Cir.), *cert. denied,* 368 U. S. 930 (1961).

See also *Wasson* v. *Trowbridge,* 382 F. 2d 807 (2d Cir. 1967); *Knight* v. *State Board of Education,* 200 F. Supp. 174 (M. D. Tenn. 1961). These cases, however, involved an expulsion from school. The result of the action by the educators in an expulsion case would have been the drastic and complete termination of the educational experience in that particular institution.[6] But no case has yet to go so far as to hold that various trial type hearing requirements apply to such proceedings as in the present case. The trial court cites *Woods* v. *Wright,* 334 F. 2d 369 (5th Cir. 1964), for the proposition that "Arbitrary expulsions *and suspensions* from the public schools are also constitution-

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6 The *Knight* case involved an indefinite suspension which was deemed the equivalent of an expulsion.

ally repugnant on due process grounds." 267 F. Supp. at 373 (emphasis supplied). Although *Woods* did deal with a short suspension, it was an appeal from the refusal of a district court to grant a temporary restraining order. The court specifically stated that the due process question was "not properly before us for decision." 334 F. 2d at 374. Furthermore the point of *Woods* was not procedural due process but a violation of First Amendment rights. In the present case, the child has already been suspended and the determination for the District Superintendent's Guidance is how that child may best be returned to the educational system. Quite the opposite of the problem in *Wasson, Dixon, Knight,* and *Woods, supra.*

As noted above, it is the school principal that initially issues the administrative suspense. After this preliminary suspension, aside from a decision that the child should return to the school he has been attending, the District Superintendent's Guidance Conference is only authorized finally to decide whether or not he should be transferred to another school. At most what is involved would be a change of school assignment.

The court below found that "a 'Guidance Conference' can *ultimately* result in loss of personal liberty to a child or in a suspension which is the functional equivalent of his expulsion from the public schools or in a withdrawal of his right to attend the public schools." 267 F. Supp. at 369 (emphasis supplied). The difficulty with this holding is, of course, the word "ultimately." The trial court by a series of hypothetical assumptions, in effect, turned a mere Guidance Conference relating to Victor's future educational welfare into a quasi-criminal adversary proceeding. The possibilities of Youth House, the Psychiatrist Division of Kings County Hospital or Bellevue Hospital, institutionalization, or attendance enforcement proceedings were men-

tioned. 267 F. Supp. at 371-72. When, as and if, in the future, Victor or his parents find themselves faced with charges in the Family Court, there would seem to be adequate safeguards in the law for preservation of their constitutional rights, including the right to counsel. Family Court Act §741. At the most, the Guidance Conference is a very preliminary investigation, if it can be considered an investigation at all. After the conference, aside from a school reassignment, if any, a whole series of further investigations, hearings and decisions must occur before the child is subjected to any of the "serious consequences" which the district court suggested "flow for the juvenile involved in a District Superintendent's Guidance Conference." 267 F. Supp. at 370. The real question is at what point along this chain is the full panoply of due process safeguards to apply.

> "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. . . ." *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152-53 (1941).

While it is arguable that in view of the limited character of the action that may be taken, a Guidance Conference cannot result in a deprivation of "liberty" within the meaning of the Fourteenth Amendment, the contrary will be assumed for present purposes and the question whether the due process clause requires the presence of counsel at such a conference will be considered forthwith.

II.

If due process is applicable to such a conference, it would not follow that the school must permit the presence of

counsel. The "differing rules of fair play" encompassed by the concept of due process "vary according to specific factual contexts . . . and differing types of proceedings." *Hannah* v. *Larche*, 363 U. S. 420, 442 (1960).

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . . '"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions. . . . ' *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U. S. 123, 162-63 (concurring opinion)." *Cafeteria and Restaurant Workers Union* v. *McElroy, supra* at 895.

In *Dixon* v. *Alabama Board of Education, supra*, which was relied upon heavily by the court below, the Fifth Circuit Court of Appeals recognized that "The minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved." 294 F. 2d at 155. The court set forth in some detail the due process safeguards it deemed necessary in an expulsion proceeding and, significantly, those due process requirements did not include the right to counsel.

> "For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. They should, we think, comply with the following standards. The notice should contain a statement of the specific charges and grounds which, if proven,

would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of mis-

conduct of this particular type, we feel that the requirements of due process of law will have been fulfilled." 249 F. 2d at 158-59.

Similarly, the court in *Knight* v. *State Board of Education, supra,* stated that, "the conclusion appears inescapable upon the present record that the rudiments of fair play and the requirements of due process vested in the plaintiffs the right to be forewarned or advised of the charges to be made against them and to be afforded an opportunity to present their side of the case before such drastic disciplinary action was invoked by the university authorities." 200 F. Supp. at 178. Again there was no mention of representation by retained counsel.

The trial court seemed to think that once due process requires a hearing, the right to representation by counsel follows automatically. In support of this conclusion, it cites *Powell* v. *State of Alabama,* 287 U. S. 45 (1932).

> "What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. . . . " at 68.

But *Powell* was a criminal case heard before a court of law. Later in the same paragraph quoted above, Justice Sutherland went on to note:

> " . . . If in any *case,* civil or criminal, a state or federal *court* were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." At 69 (emphasis supplied).

The present situation is the polar opposite from the criminal trial as depicted, for example, in *Gideon* v. *Wainwright*, 372 U. S. 335, 344-45 (1963). There the Court stressed the unfairness of a lawyerless defendant being opposed by a government lawyer-prosecutor in an adversary proceeding where liberty is at stake. Here the District Superintendent has no lawyer present, does not regard the proceeding as adversary, and the child's liberty is not in peril.

The right to representation by counsel is not an essential ingredient to a fair hearing in all types of proceedings.

> "... The utmost devotion to one's profession and the fullest recognition of the great role of lawyers in the evolution of a free society cannot lead one to erect as a constitutional principle that no administrative inquiry can be had *in camera* unless a lawyer be allowed to attend." *In re Groban*, 352 U. S. 330, 336 (Frankfurter, *J.*, concurring).

For example, due process is not denied because a person is refused the right to be represented by counsel in a hearing before a draft board. *United States* v. *Sturgis*, 342 F. 2d 328 (3d Cir. 1965); *Niznik* v. *United States*, 173 F. 2d 828 (6th Cir. 1949); *United States* v. *Pitt*, 144 F. 2d 169 (3d Cir. 1944).

In *In re Groban*, 352 U. S. 330 (1957), the Supreme Court held that a person had no constitutional right to be assisted by retained counsel in giving testimony at an investigatory proceeding conducted by a Fire Marshal. There the Court stated:

> "It is clear that a defendant in a state criminal trial has an unqualified right, under the Due Process Clause, to be heard through his own counsel. *Chandler* v.

Fretag, 284 U. S. 3. Prosecution of an individual differs widely from administrative investigation of incidents damaging to the economy or dangerous to the public. The proceeding before the Fire Marshal was not a criminal trial, nor was it an administrative proceeding that would in any way adjudicate appellants' responsibilities for the fire. It was a proceeding solely to elicit facts relating to the causes and circumstances of the fire. . . ." at 332.

"The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel. Appellants here are witnesses from whom information was sought as to the cause of the fire. A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies. There is no more reason to allow the presence of counsel before a Fire Marshal trying in the public interest to determine the cause of a fire. Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination. . . ." at 332-33 (footnotes omitted).

Because, after the hearing the Fire Marshal can arrest the witness if he believes that there is evidence sufficient to charge him with arson or a similar crime (at 338, dissenting opinion), *Groban* would seem to have presented even a stronger case for allowing the presence of counsel

than the present case which does not at all purport to investigate possible criminal activity or to prosecute. The holding in *In re Groban* was followed in *Anonymous* v. *Baker*, 360 U. S. 287 (1959). See also *Nason* v. *Immigration and Naturalization Service*, 370 F. 2d 865 (2d Cir. 1967), where this Court held that a witness was not entitled to have a lawyer present at a preliminary interrogation by the Immigration and Naturalization Service even where the witness might become the object of a deportation proceeding.

Recent Supreme Court decisions concerning procedures of the juvenile courts are not to the contrary. *Kent* v. *United States*, 383 U. S. 541 (1966), involved the referral of a youthful offender from the juvenile court to the adult criminal court. The Court there stressed the "tremendous consequences" of such a decision and held that before it was made, the juvenile was entitled to a hearing and to the assistance of counsel. But the "tremendous consequences" to which the Court was referring in that case were "that the child will be taken from the Receiving Home for Children and transferred to jail along with adults, and that he will be exposed to the possibility of a death sentence instead of treatment for a maximum, . . . until he is 21." 383 U. S. at 553-54.

In *In re Gault*, 387 U. S. 1 (1967), the Supreme Court held that due process required that in a proceeding to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by retained counsel, or if they are unable to afford counsel, that counsel will be appointed to represent the child. However, in writing for the majority, Justice Fortas clearly implied that the right

to counsel does not exist at early stages of procedures involving juveniles:

> "The Nat'l Crime Comm'n Report recommends that 'Juvenile courts should make fullest feasible use of preliminary conferences to dispose of cases short of adjudication.' . . . Since this 'consent decree' procedure would involve neither adjudication of delinquency nor institutionalization, nothing we say in this opinion should be construed as expressing any views with respect to such procedure. The problems of pre-adjudication treatment of juveniles, and of post-adjudication disposition, are unique to the juvenile process: hence what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process." At 31, note 48 (citations omitted).

The Guidance Conference clearly is a preliminary conference, not an adjudication. As said in *Cosme* v. *Board of Education, supra,* at 232:

> ". . . These hearings are simply interviews or conferences which include school officials and the child's parents. Further, they are purely administrative in nature, and are never punitive. The parents are fully apprised of all of the facts and are furnished with copies of all information in respondent's possession." *Cosme* v. *Board of Education, supra,* at 232.

What due process may require before a child is expelled from public school or is remanded to a custodial school or other institution which restricts his freedom to come and go as he pleases is not before us.

Appellees here argue that the presence of a lawyer is necessary because it is he "who has the communicative

skill to express the position of the student's parents when —because of lack of education, inarticulateness, or simply awe at the array of highly educated and articulate professionals in whose presence they find themselves—they may themselves be unable to do so, . . ." (Appellees' Brief, p. 15). However, it does not appear that a lawyer could solve this communication problem. Actually the trial record supports the view, despite some testimony to the contrary (141-49), that the social worker, who is allowed to attend the Guidance Conference, would provide more adequate counsel to the child or the parents than would a lawyer.

Appellees also argue that the presence of counsel is necessary because the decision of the Guidance Conference depends to a certain degree on the school's statement of the child's misbehavior and that this statement may be incorrect. In the present case there were eleven incidents of misbehavior reported by seven different teachers. The mere attendance of counsel at the conference would do little to aid this problem without also granting the other rights accorded in adversary proceedings—calling of witnesses, cross-examinations, etc. To do so would be destructive of the original purpose of the Guidance Conference—to provide for the future education of the child. The conference is not a judicial or even a quasi-judicial hearing. Neither the child nor his parents are being accused. In saying that the provision against the presence of an attorney for the pupil in a District Superintendent's Guidance Conference "results in depriving plaintiffs of their constitutionally protected right to a hearing" (267 F. Supp. at 373), the trial court misconceives the function of the conference and the role which the participants therein play with respect to the education and the welfare of the child. Law and order in the classroom should be the responsibility of our

respective educational systems. The courts should not usurp this function and turn disciplinary problems, involving suspension, into criminal adversary proceedings—which they definitely are not. The rules, regulations, procedures and practices disclosed on this record evince a high regard for the best interest and welfare of the child. The courts would do well to recognize this.

III.

While it is most doubtful that there is any basis in law or fact for considering Victor Madera and his parents to be representatives of, and champions for, a class, a ruling on this point becomes unnecessary in view of the decision that the complaint must be dismissed for failure to state a claim on which relief can be granted.

Judgment reversed; injunction vacated and complaint dismissed.

APPENDIX B

Opinion No. 33404

(543-600)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 635

Appearances:

HAROLD J. ROTHWAX, Esq. By: ROBERT SUGARMAN, Esq., and SUE ANN SHAY, Esq., 65 East 7th Street, New York, New York. Attorneys for Plaintiffs.

J. LEE RANKIN, Esq., Corporation Counsel of the City of New York. By: PETER J. FLANAGAN, Esq., Municipal Building, New York, New York 10007. Attorneys for Defendants.

CONSTANCE BAKER MOTLEY, *D. J.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The minor plaintiff, Victor Madera, is a 14 year old pupil enrolled in Public School 22, a junior high school in the New York City public school system. On February 2, 1967, Victor was suspended from school by the principal. He has been out of school since that date.

After Victor was suspended, the principal of his school notified the District Superintendent of District No. 1, Miss Theresa Rakow, a defendant in this suit.[1] Miss Rakow notified Victor's parents, the adult plaintiffs, that a conference would be held in her office on February 17, 1967 with regard to Victor's suspension. The notice advised: 1) there would be a Spanish speaking person at this conference to translate "for all of us," and 2) a friend could be brought to assist the parents in this translation. The notice stated: "You are hereby advised that you are to be present at this conference. Please bring (Victor) with

you . . ." The letter was in both English and Spanish. Victor's mother speaks Spanish; she does not speak or understand English. The principal's actions and Miss Rakow's actions were taken pursuant to General Circular No. 16 (1965-1966).[2] This circular embodies the rules and regulations promulgated by the other defendants, the Board of Education of the City of New York and the Superintendent of Schools, with regard to pupil suspensions.

After Victor's parents received the notice, they secured an attorney who contacted Miss Rakow's office to notify her that the attorney would appear at the February 17 hearing.[3] The attorney was advised that he could not attend the hearing. Circular No. 16 provides as follows:

> "Inasmuch as this is a guidance conference for the purpose of providing an opportunity for parents, teachers, counselors, supervisors, et al., to plan educationally for the benefit of the child, attorneys seeking to represent the parent or child may not participate." (Circular No. 16, p. 5.)

On February 16, 1967, at 8:15 P.M., after notice to defendants and oral argument, this court issued a temporary restraining order restraining defendants as follows:

> "From holding any proceedings at which the rights of any of the plaintiffs may be affected and, particularly, from conducting the 'Assistant Superintendent's Hearing' scheduled for February 17, 1967, without permitting plaintiffs' legal counsel to be present and to perform his tasks as an attorney."

The incident which precipitated Victor's suspension on February 2 resulted in the filing of a charge of juvenile delinquency against him on February 8 by a teacher, an

employee of defendant Board of Education, in the Family Court. New York Family Court Act, §§ 712, 733.[4]

The same attorneys representing plaintiffs here also were retained to represent Victor in the Family Court. The New York Family Court Act, § 728, gives Victor the right to counsel in a juvenile delinquency proceeding. On February 28, the claim that Victor was a juvenile delinquent was dismissed by the Family Court. There "was a substitution and a finding that has not been completed, a fact-finding that (Victor) is a young person in need of supervision."[5]

Defendants did not proceed with the February 17 hearing under the conditions permitted by the temporary restraining order. The order also required counsel for both sides to appear in court on February 21, at which time reargument would be heard on the temporary restraining order and plaintiff's application for a three-judge court.

On February 21, defendants requested and were granted a continuance on the ground that all defendants had not been served. Defendants agreed to a continuance of the temporary restraining order until March 1 at which time, if a three-judge court was not required, the court would proceed to hear plaintiffs' motion for preliminary injunction.

On February 24, plaintiffs filed an amended complaint and motion for preliminary injunction. The original complaint predicated jurisdiction wholly upon Title 28, United States Code, § 1331. Declaratory relief,[6] interlocutory and permanent injunctive relief was sought. The original complaint prayed for the convening of a special three-judge district court to hear and determine this action. Title 28, U. S. C., §§ 2281, 2284. The amended complaint also prayed for the convening of a three-judge court but invoked an additional jurisdictional base for this cause, i.e.,

Title 28, U. S. C., § 1343. The amended complaint relied upon the provisions of Title 42, U. S. C., §§ 1981 and 1983 as the federal statutes giving rise to this cause of action.

On March 1, 1966, this court ruled that this cause is not properly a cause of action requiring a statutory three-judge court. Under constitutional attack here is a provision of a circular issued by a local school board, not the constitutionality of any state statute.[7] The "no attorneys provision" is not mandated by any state law. However, the circular is promulgated pursuant to authority granted by a state statute. New York Education Law, § 2554 (13) (b). Nevertheless, the attack upon the circular does not present the type of constitutional challenge to state action that would require the convening of a three-judge court. The guiding principle for three-judge court cases was laid down by the Supreme Court in *Phillips* v. *United States,* 312 U. S. 246 (1941) as follows:

> "To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission'. The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy" (at 251).

Consequently, where that which is under attack is not mandated by state law but is only a regulation of a local school board, adopted on its own volition, and is not of state-wide application, although authorized by state law, the con-

troversy may be properly adjudicated by a single judge court. *Griffin* v. *County School of Prince Edward County, Va.*, 377 U.S. 218 (1964); *Sweeney, et al.*, v. *State Board of Public Assistance*, 26 F. Supp. 171 (M.D. Pa. 1940), aff'd 119 F.2d 1023.

When the hearing on plaintiffs' motion for preliminary injunction commenced on March 1, defendants moved to dismiss the case as moot on the ground that the Family Court proceeding had already taken place. One of plaintiffs' claims on their application for a temporary restraining order was that counsel should be permitted at the February 17 Guidance Conference because the facts adduced from Victor there could be used against him in the subsequently scheduled Family Court hearing on the juvenile delinquency charge where Victor's personal liberty would be in jeopardy. Family Court Act, § 744.[8] Plaintiffs also claimed that the February 17 Guidance Conference might result in forcing adult plaintiffs to choose between signing a "consent", required by law, which would enable the school authorities to make whatever school or other institutional placement they deemed desirable for Victor, or face neglect charges in Family Court for failure to sign the "consent". New York Education Law, §§ 3205,[9] 3212-1, 2b,[10] 3214,[11] New York Family Court Act, §§ 312,[12] 332,[13] 335,[14] 337.[15]

Plaintiffs' constitutional contentions with respect to the foregoing claims are: 1) the "no attorneys provision" of Circular No. 16 deprives them of protection for their right against self incrimination, right to counsel and right to due process guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, since any statements made by them in, or as a part of, the Guidance Conference may be used against them in subsequent Family Court proceedings, where Victor's personal liberty will be in jeopardy and 2) the minor

plaintiff's right not to testify against himself must be preserved because one of the consequences of a Guidance Conference may also be loss of personal liberty. Circular No. 16, p. 5.

As indicated above, the Family Court proceeding against Victor had not been completed on March 1. Moreover, it was clear to this court that plaintiffs' claims in this action were not limited to the foregoing described claims. In addition, plaintiffs claim that as a result of a Guidance Conference, Victor may be suspended from school for an indefinite period of time, placed in a school for socially maladjusted chidlren (formerly known as "600" schools), involuntarily incarcerated in an institution, or referred to the Family Court for appropriate action. (Amended Complaint, para. 15).

Plaintiffs' constitutional contention with respect to these claims are that since the above enumerated irreparable consequences can flow from a Guidance Conference, the "no attorneys provision" of Circular No. 16 may result in Victor being denied his right to attend the public schools granted him by the Constitution and Education Law of the State of New York, without due process of law guaranteed by the Fourteenth Amendment.[16]

After considering the gravity of plaintiffs' constitutional claims, and the fact that the Family Court proceeding had not been concluded, this court ruled on the March 1 hearing that plaintiffs' case is not moot.

Defendants' counsel then moved to dismiss on the ground that plaintiffs had abandoned their attack on the constitutionality of certain provisions of the New York Education Law and were now proceeding under the Civil Rights Law which plaintiffs had not previously invoked. Defendants' counsel was mistaken in this belief. Plaintiffs in amending their complaint rely on a Federal Civil Rights Statute, i.e., Title 42, U. S. C., § 1983.[17] This statute gives plaintiffs

the right to bring this action for injunction to enjoin defendants who, plaintiffs claim, acting under color of state law, are unconstitutionally enforcing the "no attorneys provision" of Circular No. 16 against plaintiffs. Such state action, plaintiffs maintain, violates their rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. This court has jurisdiction of such an action. *Monroe* v. *Pape,* 365 U. S. 167 (1961); *Taylor* v. *Board of Education of City of New Rochelle,* 294 F.2d 36 (2d Cir. 1961) cert. denied, 368 U. S. 940; Title 28, U. S. C., § 1343(3).[18]

Defendants have questioned the propriety of a federal court determining the issues raised in this case on the ground that this is a matter preferably handled by the state. However appropriate such considerations of state as opposed to federal relief may be in some cases, it does not appear that this is a proper case for the court to refrain from acting. It is now a well settled principle that relief under the Federal Civil Rights Acts may not be defeated because relief was not first sought under state law which provided a remedy. *Monroe* v. *Pape, supra.* The whole purpose of the Federal Civil Rights Acts would be seriously undermined if a federal claim in a federal court must await an attempt to vindicate the very same claim in a state court. *McNeese* v. *Board of Education,* 373 U. S. 668 (1963). Where the terms of the state (local school board) provision under attack are clear, there is no basis for abstention to require plaintiffs to exhaust either state administrative or judicial remedies. *Rivers* v. *Royster,* 360 F.2d 592 (4th Cir. 1966). As another federal court said in a school case involving suspensions and expulsions, *Woods* v. *Wright,* 334 F.2d 369 (5th Cir. 1964) at 374-375:

> "We are fully aware of the reluctance with which the Federal Courts should contemplate the use of the

injunctive power to interfere with the conduct of state officers. But when there is a deprivation of a constitutionally guaranteed right the duty to exercise the power cannot be avoided."

Upon the hearing of plaintiffs' motion for preliminary injunction and upon the trial, which were consolidated, the following facts were established in addition to those set forth above:[19]

There are 1,084,818 pupils in the New York City public school system, 20.9% of whom are Puerto Rican, 29.3% are Negro, and 49.8% are white.

School District No. 1 is located in Manhattan, one of the five boroughs (counties) which comprise the City of New York. The District boundaries, generally speaking, are from Grand Street north to 21st and 23rd Streets and from the Bowery and Fourth Avenue to the East River. The area thus described is commonly referred to as the Lower East Side. It is a racially mixed area but predominantly Puerto Rican. It is a community of low income families in the main. There are 28,000 pupils in the District in a total of twenty-three schools. There are 14 elementary schools, 4 junior high schools, 2 special schools for socially maladjusted children, and 3 high schools in District No. 1.

District Superintendent Rakow, in addition to having responsibility for the supervision of the educational program of the District, conducts hearings relating to the suspension of students, as required by New York Education Law, § 3214. Miss Rakow and the other school authorities choose to refer to these hearings as "Guidance Conferences." These conferences are conducted in cases where a student has been suspended by the principal. Once a principal has suspended a child and so notified the parents and Miss Rakow, it is Miss Rakow's duty to hold a "Guidance Conference," "to determine," to use her words,

"what next educational step may be taken to help the child." There are two kinds of principal's suspensions. There is what is called a "principal suspense which means that the principal merely suspends the child from school service until such a time as he personally can confer with the parent and try to make the adjustment directly in the school." In such a case, the principal is limited to keeping the child from school and for no more than five days. The principal generally meets with a parent before a suspension to try to adjust the problem. However, if there is some emergency where there is not time to meet with the parent, a principal might suspend immediately. After a principal's conference with the parent, the child is returned to school. A child does not *normally* go to the District Superintendent's office immediately after the principal's suspension as was the case with Victor. If after the pupil has returned to school there continues to be a problem which the principal feels he cannot handle, then the principal can suspend the pupil and refer that suspension to the District Superintendent. There is no evidence that Victor had been thus previously suspended by the principal.

When a suspended pupil is referred to the District Superintendent this is known as an "administrative suspense." There is no hearing held by the principal before an "administrative suspense" takes place. When the District Superintendent receives a copy of a letter from the principal to the parents stating that the child has been suspended, the District Superintendent notifies the parent of the date of hearing. The principal's letter advises the parents that they will be so notified.

When a conference is held in the District Superintendent's office, she invites the principal of the suspended child's school and the guidance counselor of that school. The members of the District Superintendent's staff who attend are: her assistant, the guidance counselor assigned to her office, and the school-court coordinator assigned to the district. The Bureau of Attendance, an arm of the

Board of Education, which enforces the state's compulsory school attendance law is also notified of the conference.

The function of the school-court coordinator is to provide liaison between the Family Court and the schools. The school-court coordinator interprets to the court "the program and facilities" of the school; "he conversely interprets to the school the decisions of the court and the recommendations of the court;" the school-court coordinator "acts as a sort of clearing house, so that all agencies may work together . . .;" the school-court coordinator also, at the request of the court, gives to it the decision made by the District Superintendent at the Guidance Conference. The court may make use of the District Superintendent's decision at the dispositional hearing. New York Family Court Act, §§ 345, 346. The school-court coordinator also takes notes at the conference.

The guidance counselor on the District Superintendent's staff has the responsibility for "following up on children who have been suspended, to make sure that they are adjusting properly, *to make sure that recommendations are carried out.*" (Emphasis added.) The guidance counselor works with the Bureau of Child Guidance, (BCG) "so that if [the District Superintendent] has asked for a study and a recommendation for a child," she can work with the BCG "to expedite the receiving of that study as soon as possible." The guidance counselor also takes notes at the Guidance Conferences and keeps all records. When children return from suspension, the guidance counselor helps to place them in the best possible school situation.

The suspended child may have a representative from any social agency, to whom the family may be known, to attend a suspension hearing in the District Superintendent's office.

At the conference, all school personnel present sit around a table in Miss Rakow's office and discuss the child's anecdotal record, supplied by the principal, and

the child's problems. Usually the parents and the child wait outside until a decision is reached. The parents and child are then brought in and asked if they have anything to say as to what should be done with the child. If the child is old enough, he is asked to express an opinion. If a representative of a social agency is present, he or she contributes to the discussion. The decision is then given to the child and his parents.

The decisions which the District Superintendent may reach are the following:

1. The suspended child might be reinstated in the same school.

2. The suspended child might be transfered to another school of the same level, e.g., a junior high school child to another junior high school.

3. The suspended child might be transferred to a special school for socially maladjusted children; there are two in District No. 1.

4. The District Superintendent may refer the student's case to the Bureau of Child Guidance (BCG) or other social agency for study and recommendations, including medical suspension, home instruction, or exemption.

5. The District Superintendent may refer the case to the Bureau of Attendance for court action.

The BCG is the clinical arm of the Board of Education. Its employees are social workers, psychologists and psychiatrists. When the District Superintendent refers a child to the BCG, it makes a study of the child "as seems indicated to help" the District Superintendent or to advise her "of what may be best educational placement."

The BCG may make one of the following recommendations:

1. The child is able to attend school but should be sent to a school with a particular kind of program.

2. The child should be sent to a special day school for socially maladjusted pupils or a residential institution where defendant Board of Education operates such a school.

3. The child should be instructed at home.

4. The child should be temporarily exempted from school while his parents seek institutional help.

5. The child should receive a medical suspension or exemption.

6. The child should be exempt from school.

If the child has not been attending school or has been attending irregularly, the child may be referred by the District Superintendent to the Bureau of Attendance. If the compulsory school attendance law is not being obeyed, it is the responsibility of the Bureau of Attendance to take the matter to the Family Court where the pupil may then be sent to an institution.

In administrative suspense matters it is the general practice of the District Superintendent's office to notify the Bureau of Attendance of a Guidance Conference. The Bureau sends an attendance teacher to the home of the child to notify the parents of the suspense conference and request their appearance at the arranged time.

When, after a Guidance Conference, the District Superintendent decides that a child should be in a special day school for socially maladjusted children, the parents are notified by letter to report to the school with the child. In other words, the cooperation and consent of the parents is thus sought in placing a child in a special day school for socially maladjusted pupils. If the child and his parents do not report for admission and attendance, the principal of the special school notifies the Bureau of Attendance. The Bureau of Attendance then petitions the Family Court to take appropriate action. The

defendant Board of Education maintains and operates 17 such special day schools throughout New York City.[20]

When there is a decision by the BCG and the District Superintendent that a student should receive his schooling in a residential institution where the defendant Board of Education operates a special school for socially maladjusted children, again parental consent is first sought. The guidance counselor in the District Superintendent's office contacts the parents and advises them that in the opinion of the BCG, the school authorities and in the opinion of any other interested social agency that happens to be involved, this child should be institutionalized for an extended period of time.

If the parents "voluntarily" accept the recommendation, steps are then taken for the placement of the child. If the parents do not consent, then the Bureau of Attendance petitions the Family Court to place the child in an institution. The defendant Board of Education does not operate the residential institutions, per se, but the Board does operate schools in more than 30 such residential institutions, remand centers, psychiatric hospitals and treatment centers.[21]

CONSEQUENCES OF DISTRICT SUPERINTENDENT'S CONFERENCE

Schools for socially maladjusted pupils (formerly known as "600" schools because of their numerical designation) were established about eighteen years ago. In 1964, there were 27 of these schools with 14 annexes serving a pupil population of about 5,200. Fourteen of the 27 schools in 1964 were day schools serving about 2,000 pupils from 10 to 18 years of age. The remaining schools were located in hospitals, treatment and remand centers, and residential institutions. Of the 14 days schools, only one served girls. The other 13 served boys "whose alleged common characteristics included repeated disrupted and aggressive behavior." The "600" schools located in hospitals, treatment and remand centers and residential institutions are

staffed by defendant Board of Education personnel. These institutions are not owned or operated by the defendant Board. The "600" schools are not schools for children with retarded mental development; these children are assigned to special classes known as classes for children with retarded mental development (CRMD). Children with high I.Q. may be assigned to "600" schools. The foregoing facts are contained in plaintiffs' exhibit 3, entitled, "A Report on the '600' Schools: Dilemmas, Problems, and Solutions" prepared by Dr. Bernard Mackler from a study made by him for the defendant Board. Dr. Mackler's report will soon be published. He testified for plaintiffs on the trial of this case. His testimony was substantially the same as the material contained in his report. Dr. Mackler's chief recommendation is that the "600" schools be abolished. His indictment of this relatively new system of school within the New York public school system reads as follows:

> "The present '600' school program attempts to protect regular teachers and students from undue or damaging disruption, and to provide a therapeutic milieu for the disturbed child. But this program *is*, however worthwhile, ethnically segregated,[22] inconveniently located, undersupported, organizationally unstable, and unable to meet the needs of its student body"[23] (pp. 4-5).

If the BCG should recommend that the child be placed in an institution, every possible assistance is given a cooperative parent by the District Superintendent to help the parent secure a place in an institution. However, there is a serious problem with respect to a recommendation for institutional placement. The available facilities are severely limited. This means that such placements take time. While the child is awaiting placement in an insti-

tution, the BCG may make one of the following recommendations: 1) That the child be given home instruction "if possible"; 2) That the child be suspended pending institutional placement; 3) That the child be exempted from school while he awaits institutional placement. Finally, the District Superintendent testified: "if it isn't taking too long, the child *remains* on suspense" pending institutional placement. (Emphasis added.)

If a parent is reluctant or uncooperative or refuses to follow the recommendation of the BCG that the child be placed in an institution, the District Superintendent refers the matter to the Bureau of Attendance which then petitions the Family Court. New York Education Law, § 3214.

The statute relevant to suspensions of pupils and their placement in institutions is New York Education Law, § 3214.[24] By the terms of § 3214, defendant school authorities have the power to suspend a pupil after notice and a hearing, and power to order him to attend a special school ("600" school) or "to attend upon instruction under confinement at a parental school or elsewhere." The defendant Board does not maintain parental schools. Defendants, under the statute, may make an agreement for the confinement, maintenance and instruction of a pupil "with any private school, orphans' home, or similar institution controlled by persons of the same religious faith as that of" Victor "or with the school authorities of another city or district, *or with other public agencies.*" (Emphasis added.) Such confinement may be for a period up to two years. § 3214-5. The defendants cannot, by the statute's decree, order a pupil to attend a special school or to attend school upon confinement without the "consent" of his parents. However, the statute says, if his parents refuse to "consent" in writing, they "shall" be proceeded against for violating their statutory duty to see to the pupil's

attendance at school. If the parents are proceeded against, a summons or warrant may issue for their appearance in the Family Court.[25] Such proceeding may result in the minor plaintiff being sent to an institution for an indefinite period of time.[26] If it is found that a pupil's parents have not violated their duty, then, under the statute, the pupil may be proceeded against for violating his duty to attend.

Statistical records produced by Miss Rakow (for her district only) for attendance periods covering the years 1965 and 1966 and the first month of 1967, show the following:[27]

1. During 1965, some pupils awaited placement in a school for socially maladjusted pupils after being suspended for as long as 4-6 months.

2. During 1966, some pupils awaited placement in a school for socially maladjusted pupils after being suspended for as long as 3 months.

3. At the end of January 1967, 3 pupils were awaiting placement in a school for socially maladjusted pupils. One was in his third month of suspension.

4. During 1965, some students awaited placement in an institution and were on suspension from 4-6 months.

5. During 1966, some students awaited placement in an institution on suspension from 7-10 months.

6. On January 4, 1967, the records show, one student on suspension from 7-8 months was awaiting institutional placement.

7. On January 4, 1967, the records show, one student was returned to his original school upon being in his second month of suspension and one student was transferred to another school (not a school for socially malad-

justed students) upon being on suspension for a period of 7-8 months.

8. In 1965, one student was returned to his original school after an elapse of 9-10 months on suspension.

Exemption is defined by Circular No. 16 "as the withdrawal of a child's right to attend a public school." The Circular does not describe the circumstances under which the withdrawal of this right may take effect. The Circular merely says that, "Authority to exempt from required school attendance is reserved to the Superintendent of Schools" (p. 6, ftn 2). However, as stated above, the BCG can recommend exemption. These recommendations are invariably accepted. One clear instance in which an exemption may be recommended is for medical reasons (physical or mental) as determined by BCG. An instance revealed by the records of suspended students is the case of a 15 year old student with a history of behavior problems and emotional difficulty who was exempted from required attendance at public school. There is no definite indication as to what extent this exemption was "medically" based. How frequently this device is used with juveniles who have behavior problems and are approaching the voluntary school leaving age of 16 is not ascertainable since the court reviewed only the records of recent suspensions in School District No. 1 and not of the entire New York City school system.

As a result of a review of the testimony, exhibits and records produced by the District Superintendent, this court finds that a "Guidance Conference" can ultimately result in loss of personal liberty to a child or in a suspension which is the functional equivalent of his expulsion from the public schools or in a withdrawal of his right to attend the public schools.

This court also finds that as a result of a "Guidance Conference", adult plaintiffs may be in jeopardy of being

proceeded against in a child neglect proceeding in the Family Court.

For the foregoing reasons, this court concludes that the due process clause of the Fourteenth Amendment to the Federal Constitution is applicable to a District Superintendent's Guidance Conference. More specifically, this court concludes that enforcement by defendants of the "no attorneys provision" of Circular No. 16 deprives plaintiffs of their right to a hearing in a state initiated proceeding which puts in jeopardy the minor plaintiff's liberty and right to attend the public schools.

Due Process and the Right to a Hearing

One of the basic constitutional components of a hearing was described more than three decades ago by the United States Supreme Court:

> "What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand

> of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, *civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense. (Emphasis added.)" *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932).

And when does due process require a hearing?

> "Whenever a governmental body so as to injure an individual, the Constitution requires that the act be consonant with due process of law. The minimum procedural requirements necessary to satisfy due process depends upon the circumstances and the interests of the parties involved." Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961) at 155, *cert. denied*, 368 U.S. 930.

As Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951) at 163 indicated, the question of whether the procedure to which plaintiffs here will be subjected duly observes

> "'the rudiments of fair play' . . . cannot . . . be tested by mere generalities or sentiments abstractly appealing. The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the

> protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into judicial judgment."

Serious consequences flow for the juvenile involved in a District Superintendent's Guidance Conference—in many cases without opportunity for subsequent court hearing in which the right to counsel would be present. Proceedings which involve the loss of liberty and the loss of education are of "critical importance" both to the persons involved and to our system of justice. Any such proceeding must meet federal constitutional standards of fairness. In the recent case of *Kent* v. *United States*, 383 U.S. 541 (1966), which involved procedures for referral of a youthful offender from the juvenile court to the adult criminal court, the Supreme Court etched in language not to be misunderstood what fairness entails in areas of critical importance when dealing with juveniles:

> "We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children . . . permitted this procedure. We hold that it does not." *Id.* at 554.
>
> "The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice . . ." *Id.* at 561.

It was not clear whether the holding in *Kent, supra,* was on statutory or constitutional grounds, but a recent decision, following Kent has held that the standard laid down in that case is of constitutional dimensions, *Brown* v. *New Jersey,* 35 U. S. L. Week 2553 (Mar. 9, 1967) which is also the view of this court.

The Constitution of the State of New York mandates that the legislature provide free public schools for the education of all the children of the state. Art. XI, § 1. In New York, a person over five and under twenty-one is "entitled" to attend the free public schools in the district or city in which such person resides. New York Education Law, § 3202-1.

To a minor child in New York, the right to a public school education is of monumental value; it will produce great benefits for him in both tangible and intangible terms in later life. In addition, the education of each child is of paramount importance to us as a nation. A democracy can have no more precious resource than its citizenry. As the United States Supreme Court has observed:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultured values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life

if he is denied the opportunity of an education." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954).

The valuable right to a public school education which New York has made available to all children of the state should not be invaded or denied an individual child without the proper safeguards of procedural fairness. New York has recognized a similar obligation in disciplinary proceedings for state employees, *Fusco* v. *Moses*, 304 N.Y. 424 (1952) and in revocation of state licenses proceedings, *Hecht* v. *Monaghan*, 307 N.Y. 461 (1954). How can obligations of procedural fairness be any the less applicable when a child's education is at stake? See, Reich, "The New Property", 73 Yale L. J. 733 (1964).

Neither here nor in our discussion below will we concern ourselves with the principal's suspension discussed in Circular No. 16. Those suspensions involve a maximum of five days and their consequences are not nearly as far reaching as those of the District Superintendent's Guidance Conference.

Legal Effect of Consequences of District Superintendent's Conference

As the evidence and the applicable statutes disclose, the consequences of a Guidance Conference can be very serious for both the minor child involved and his parents. According to Circular No. 16 and the testimony, not only can the District Superintendent decide to reinstate a pupil in his original school or transfer him to a different school but can also place the pupil in a special school for "socially maladjusted children". It cannot be doubted that a certain stigma attaches to the designation "socially maladjusted child" and to placement in such a special school. Circular

No. 16 says: "A suspended pupil who is subsequently remanded to Youth House or to the Psychiatrist Division of Kings County Hospital or Bellevue Hospital is automatically placed on the register of the school for socially maladjusted children . . ." (p. 6, ftn 3). However, beneficient the motives of the school authorities in protecting the interest of the child, the fact remains, as Dr. Mackler testified, that the decision is stigmatizing and one of great psychological consequence to the child. This state created stigma is imposed by the decisions coming out of the Guidance Conference—decisions which the evidence discloses are essentially *ex parte* determinations.

In addition to commitment to a special school for socially maladjusted pupils, the District Superintendent may refer the pupil to the BCG for study and recommendations. These recommendations may include: attendance at a school for socially maladjusted pupils, medical suspension, home instruction, exemption from school attendance or temporary exemption from school while the parents seek institutional help.

Pending the BCG's recommendations, the District Superintendent may continue a pupil on suspension. The evidence reveals that some pupils may be out of school a whole year, or its equivalent, i.e., 7-10 months, awaiting institutional placement. Even in the case of pupils transferred to another school, (other than a school for the socially maladjusted) the suspension can be as long as 7-8 months. Such prolonged suspension, as opposed to the minor disciplinary 5-day principal's suspension, must have very serious educational consequences for the child involved. Not only may extended suspension greatly damage a child in his opportunity for education, but in some cases it may be the functional equivalent of an expulsion from the public schools. For a child who has been forced to be out of school eight months and who while so suspended passes

the school leaving age, the incentive to return to school under the heavy educational handicap which such a long suspension obviously inflicts, must be very small indeed.

Moreover, the BCG can recommend that the child be exempted from school. If such a recommendation is approved by the defendant Superintendent of Schools, enforcement of such a recommendation may operate as a sophisticated expulsion.

If the BCG recommends that a suspended child be placed in a school for socially maladjusted children or an institution either for mental health or other reasons, that recommendation is carried out by the guidance counselor assigned to the District Superintendent's office and the Bureau of Attendance. The parents are contacted by the guidance counselor or the Bureau of Attendance and the parents consent to such institutional placement is secured. There is the requirement of parental "consent" before such confinement, but this consent is wholly illusory. Such consent can be withheld only on pain of prosecution under another state statute for neglect of parental duties. The statute on its face calls for such action. New York Education Law, § 3214-5c(1) and § 3212. "Consent" given in such circumstances cannot be said to carry with it that element of voluntariness recognized as "consent" in law. Cf., *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). The parents are presented with "a choice between the rock and the whirlpool." Cf., *Garrity* v. *New Jersey*, —— U.S. ——, 87 S. Ct. 616 (1967) at 618. The jeopardy that lack of consent to their child's confinement poses for a parent after a Guidance Conference further points up the seriousness of what is at stake. We are well outside the realm of minor ministerial or disciplinary school matters.

The Guidance Conference may result in a referral of the suspended child to the Bureau of Attendance for court action. Such court action may also result in confinement to a state institution for an indefinite period of time.[28]

Finally, one consequence of a Guidance Conference may be that any decision made by the District Superintendent may be furnished the Family Court in a subsequent juvenile delinquency proceeding when the court considers what disposition may be made of the child. Plaintiffs claimed that any statements made by them during the Guidance Conference might be admitted into evidence against them in subsequent Family Court proceedings. However, the admissibility of any statement made during the Guidance Conference as presently conducted is now the subject of considerable doubt. *Garrity* v. *New Jersey, supra; Spevack* v. *Klein,* —— U.S. —— 87 S. Ct. 625 (1967); *Miranda* v. *Arizona,* 384 U.S. 436 (1966). *In the matter of Gregory W.,* 18 N.Y. 2d 55 (1966) the highest court of the State of New York held the due process clause of the Fourteenth Amendment applicable to juvenile delinquency proceedings. In so holding the New York Court of Appeals said:

> "While the Family Court Act specifically states that the proceedings held thereunder are not criminal in nature the various provisions made for the protection of the rights of children who are charged with juvenile delinquency are indicative of a legislative recognition of the fact that such proceedings, resulting as they do in a loss of personal freedom, are at the very least quasi-criminal in nature. As the legislative committee report states: 'Any commitment—whether "civil" or "criminal", whether assertedly for "punitive" or "rehabilitative" purposes—involves a grave interference with personal liberty.' " *In the matter of Gregory W., supra,* at 62.

Consequently, enforcement of the "no attorneys provision" of Circular No. 16 may deprive plaintiffs of their right against self incrimination but this court finds it unnecessary to so held.

What is certain however, and what this court now holds is that enforcement of the "no attorneys provision" at a District Superintendent's Guidance Conference results in depriving plaintiffs of their constitutionally protected right to a hearing. A hearing is required by state law before a child can be committed to "a special day school, or to attend upon instruction under confinement at a parental school or elsewhere, . . . for a period not exceeding two years . . ." New York Education Law, § 3214-5a. However, the "no attorneys provision" of Circular No. 16 operates to deprive the statutorily decreed hearing of an element so essential thereto as to nullify the right to a hearing.

Fundamental fairness dictates that a student cannot be expelled from a public educational institution without notice and hearing. *Dixon* v. *Alabama State Board of Education,* 294 F. 2d 150 (5th Cir. 1961) *cert. denied* 368 U.S. 930 (College expulsion). This principle has been applied to suspension from a state university. *Knight* v. *State Board of Education,* 200 F. Supp. 174 (M. D. Tenn. 1961). Arbitrary expulsions and suspensions from the public schools are also constitutionally repugnant on due process grounds. *Woods* v. *Wright,* 334 F. 2d 369 (5th Cir. 1964). The need for procedural fairness in the state's dealing with college students' rights to public education, where in many instances students are adults and have already attained at least a high school diploma, should be no greater than the need for such fairness when one is dealing with the expulsion or suspension of juveniles from the public schools. Such fairness seems especially required when the child involved has yet to acquire even the fundamental educational prerequisites that would allow him to go on to college. Cf., *Woods* v. *Wright, supra.*

When this court considers the totality of the facts and circumstances here, the right to a hearing is a due process requirement of such constitutional significance as to void application of defendants' "no attorneys provision" to the District Superintendent's Guidance Conferences.

Defendants have objected that the presence of an attorney would change a "therapeutic" conference into an adversary proceeding, to the great detriment of any children involved. This court does not agree that this is the necessary consequence of having an attorney present. This court does not by this decision say that a full, judicial style hearing with cross-examination of child witnesses and strict application of the rules of evidence is required. There should be latitude for the Board in conducting such a hearing. But this latitude should not be so wide as to preclude the child and parents from exercising their constitutionally protected right to be represented at such a hearing by counsel.

In *Miranda* v. *Arizona, supra,* at pp. 479-480, the Supreme Court quotes appropriately from Mr. Justice Brandeis:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.
>
> Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (dissenting opinion).

Class Relief

The class on behalf of which plaintiffs sue are all other children and their parents who are similarly situated, i.e., pupils who have been or will be suspended from school and who have been or will be notified by the District Superintendent to attend a Guidance Conference. The facts common to each pupil member of the class are: 1) the fact of suspension pursuant to the rules and regulations of Circular No. 16, and 2) the fact that each faces an administrative suspense hearing in the District Superintendent's office. The question of law common to each member of the class, both parents and pupils, is whether the "no attorneys provision" of Circular No. 16 can be enforced against them. As the Director of the Bureau of Child Guidance testified, most of the pupils involved in the administrative suspense are members of "multi-problem families". The expression "multi-problem families" appears to be a euphemism for the new aliens in our midst—the urban poor.[29] An examination of the files of the pupils who have been suspended in District No. 1 over the past two years illuminates the problems presented to the defendant school authorities by the behavior problem child and the emotionally disturbed child. These children emerge, in the main, from the quagmire of urban poverty and the vast social distortions which now infect the inner city.[30] In the case of the children whose parents are recently arrived Puerto Ricans, there is sometimes the added problem of lack of "acculturation", to use the expression of the Director of the Bureau of Child Guidance. Difficult as the problems thus presented might be, they are not a reason for setting aside constitutional guarantees. *Cooper* v. *Aaron*, 358 U.S. 1 (1958), *Buchanan* v. *Warley*, 245 U.S. 60 (1917). For most of these children, perhaps, the one state conferred benefit which they have of greatest monetary value is the right which has been given them by state law to attend the public schools with-

out charge. See, Reich, *The New Property*, 73 Yale Law Journal 733 (1964). This right, of course, is subject to the reasonable rules of school discipline, but when those rules operate to effectively deny or withdraw the right or to deprive a child of his liberty, the due process clause of the Fourteenth Amendment requires a hearing, as defined above, before such state action can take effect. *Dixon* v. *Alabama State Board of Education, supra; Knight* v. *State Board of Education, supra;* see *Woods* v. *Wright, supra.*

> "It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action." *Cooper* v. *Aaron, supra*, at p. 19.

This court, therefore, holds that enforcement of the "no attorneys provision" of Circular No. 16 at a District Superintendent's Guidance Conference violates the due process clause of the Fourteenth Amendment to the Federal Constitution in that such enforcement denies plaintiffs their right to a hearing by depriving plaintiffs of their right to be represented by counsel at such a conference if plaintiffs so desire.

An injunction will, therefore, issue restraining defendants from refusing to proceed immediately with the previously scheduled District Superintendent's Guidance Conference and restraining them from enforcing the "no attorneys provision" of Circular No. 16 (1965-1966) or any similar provisions barring the attendance of attorneys at such conferences if the attorney is selected by the child or his parents as their spokesman.

Dated: New York, New York,
April 10, 1967.

CONSTANCE BAKER MOTLEY
United States District Judge

FOOTNOTES

1. The New York City public school system is divided into 30 districts.

2. This circular is a revision of an earlier circular, Circular No. 11 (1964-1965) issued February 4, 1965, and attached to the original complaint. Circular No. 16 was issued April 18, 1966 and is attached to the amended complaint.

3. Plaintiffs secured attorneys from the Legal Services Unit of Mobilization for Youth, Inc. Mobilization for Youth (MFY) is a New York membership corporation which has been granted permission by the Appellate Division of the Supreme Court of New York to practice law. MFY receives public and private funds. Some of these funds come from the Federal Government (apparently anti-poverty funds) via the City of New York. MFY also has a Social Service Unit. The evidence upon the hearing of plaintiffs' motion for preliminary injunction disclosed that MFY had an "arrangement" in the past with District No. 1 whereby social workers employed by the Social Services Unit of MFY were permitted to attend District Superintendents' hearing regarding suspension of pupils known to the agency and make a report.

4. McKinney's, *Consolidated Laws of New York*, Annotated, Book 29a-Judiciary-Court Acts, Part I.

5. Statement of plaintiffs' counsel on hearing of motion for preliminary injunction on March 1, 1967. The court in a juvenile delinquency proceeding may on its own motion substitute a petition to determine whether Victor is a person in need of supervision. New York Family Court Act, §§ 716, 731.

6. Title 28, United States Code, §§ 2201 and 2202.

7. See prayer of amended complaint.

8. This section provides:

> (a) Only evidence that is competent, material and relevant may be admitted in a fact-finding hearing.
>
> (b) Any determination at the conclusion of a fact-finding hearing that a respondent did an act or acts must be based on a preponderance of the evidence. For this purpose, an uncorroborated confession made out of court by a respondent is not sufficient.

9. This section provides:

> 1. a. In each school district of the state each minor from seven to sixteen years of age shall attend upon full time day instruction.

b. Each minor from seven to sixteen years of age on an Indian reservation, other than an Indian child, shall attend upon full time day instruction.

2. Exceptions. a. A minor who has completed a four-year high school course of study shall not be subject to the provisions of part one of this article in respect to required attendance upon instruction.

b. A minor for whom application for a full-time employment certificate has been made and who is eligible therefor may, though unemployed, be permitted to attend part time school not less than twenty hours per week instead of full time school.

3. In each city of the state and in union free school districts having a population of more than forty-five hundred inhabitants and employing a superintendent of schools, the board of education shall have power to require minors from sixteen to seventeen years of age who are not employed to attend upon full time day instruction.

10. This section provides:

1. Definition. As used in this article, a person in parental relation to a minor shall include his father or mother, by birth or adoption, his step-father or step-mother, his legally appointed guardian, or his custodian. A person shall be regarded as the custodian of a minor if he has assumed the charge and care of the minor because the parents or legally appointed guardian of the minor have died, are imprisoned, are insane, or have been committed to an institution, or because, they have abandoned or deserted the minor or are living outside the state or their whereabouts are unknown.

2. Duties of persons in parental relation. Every person in parental relation to a minor included by the provisions of part one of this article:

* * *

b. Shall cause such minor to attend upon instruction as hereinbefore required, and to comply with the provisions of part one of this article with respect to the employment or occupation of minors in any business or service whatever.

11. This section provides:

1. School delinquent. A minor under seventeen years of age, required by any of the provisions of part one of this article to attend upon instruction, who is an habitual truant

from such instruction or is irregular in such attendance or insubordinate or disorderly during such attendance, is a school delinquent.

2. Special day schools. The school authorities of any city or school district may establish schools or set apart rooms in public school buildings for the instruction of school delinquents, and fix the number of days per week and the hours per day of required attendance, which shall not be less than is required of minors attending the full time day schools.

3. Parental schools. Such authorities may also establish parental schools for the confinement, maintenance and instruction of school delinquents.

4. Agreements for instruction, confinement and maintenance of school delinquents elsewhere. Such school authorities may also make agreements for the confinement, maintenance and instruction of school delinquents, with any private school, orphans' home, or similar institution controlled by persons of the same religious faith as that of the school delinquent or with the school authorities of another city or district, or with other public agencies.

5. Commitment and parole of a school delinquent.

a. Hearing. After reasonable notice to a school delinquent and to the person in parental relation to him and an opportunity for them to be heard, a public school official, as hereinafter provided, may, with the consent in writing of the person in parental relation to the school delinquent, order him to attend a special day school, or to attend upon instruction under confinement at a parental school or elsewhere, as hereinbefore provided, for a period not exceeding two years but in no case after the minor reaches the maximum age of required attendance upon instruction.

b. Official authorized to commit a school delinquent. The following public school officials shall have power to commit a school delinquent as hereinbefore provided:

(1) In a school district having a director of the bureau of compulsory education, school census and child welfare, such director or person authorized by the school authorities to act in his absence or disability; or the superintendent of schools.

(2) Elsewhere, school authorities, superintendents of schools, or district superintendents of schools.

c. Procedure in courts.

(1) If the person in parental relation to a school delinquent refuses to consent in writing to an order that he attend a special day school or a parental school, or upon instruction under confinement elsewhere, such person shall be proceeded against for violating the provisions of section thirty-two hundred twelve of this article.

(2) If the court shall find that the person in parental relation has not violated the provisions of section thirty-two hundred twelve, a proceeding shall be brought against the minor for violation of part one of this article.

d. Parole of a school delinquent. The public school official authorized to commit a school delinquent by the provisions of this section shall have power to parole any school delinquent committed under its provisions.

6. Suspension of a minor. a. The school authorities, the superintendent of schools, or district superintendent of schools may suspend the following minors from required attendance upon instruction:

(1) A minor who is insubordinate or disorderly;

(2) A minor whose physical or mental condition endangers the health, safety, or morals of himself or of other minors;

(3) A minor who, as determined in accordance with the provisions of part one of this article, is feeble-minded to the extent that he cannot benefit from instruction.

b. Procedure after suspension. In the case of a minor who is suspended as insubordinate or disorderly, immediate steps shall be taken for his commitment as provided in this section, or for his attendance upon instruction elsewhere; in the case of a minor suspended for other cause, the suspension may be revoked whenever it appears to be for the best interest of the school and the minor to do so.

7. Expense. a. The expense attending the commitment and costs of maintenance of any school delinquent shall be a charge against the city or district where he resides, if such city or district employs a superintendent of schools; otherwise it shall be a county charge.

b. The school authorities may institute proceedings before a court having jurisdiction to determine the liability of a person in parental relation to contribute towards the maintenance of a school delinquent under sixteen years of age ordered to attend upon instruction under confinement. If the court

shall find the person in parental relation able to contribute towards the maintenance of such a minor, it may issue an order fixing the amount to be paid weekly.

12. This section provides:

A "neglected child" means a male less than sixteen years of age or a female less than eighteen years of age.

(a) whose parent or other person legally responsible for his care does not adequately supply the child with food, clothing, shelter, education, or medical or surgical care, though financially able or offered financial means to do so; or

(b) who suffers or is likely to suffer serious harm from the improper guardianship, including lack of moral supervision or guidance, of his parents or other person legally responsible for his care and requires the aid of the court; or

(c) who has been abandoned or deserted by his parents or other person legally responsible for his care.

13. This section provides:

The following persons may originate a proceeding under this article:

(a) a parent or other person interested in the child;

(b) a duly authorized agency, association, society or institution;

(c) a peace officer;

(d) any person having knowledge or information of a nature which convinces him that a child is neglected;

(e) a person on the court's direction.

14. This section provides:

On the filing of a petition under this article, the court may cause a copy of the petition and a summons to be issued, requiring the parent or other person legally responsible for the child's care or with whom it is domiciled to appear at the court at a time and place to answer the petition. The court may also require the person thus summoned to produce the child at the time and place named.

15. This section provides:

(a) The court may issue a warrant directing that the parent, or other person legally responsible for the child's care

or with whom he is domiciled to be brought before the court, when a petition is filed with the court under this article and it appears that

(i) the summons cannot be served; or

(ii) the summoned person has refused to obey the summons; or

(iii) the parent or other person legally responsible for the child's care is likely to leave the jurisdiction; or

(iv) a summons, in the court's opinion, would be ineffectual.

(b) When issuing a warrant under this section, the court may also direct that the child be brought before the court.

16. *New York Constitution.* Article XI, § 1, provides:

The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated.

New York Education Law, § 3202 (1) provides:

A person over five and under twenty-one years of age is entitled to attend the public schools maintained in the district or city in which such person resides without the payment of tuition . . .

17. This statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

18. That jurisdictional statute provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

19. The complaint was amended to make this a class action.

20. As of April 5, 1967 there were 2,436 students in these special day schools. See appendix for a listing of special day schools.

21. As of April 5, 1967 there were 643 students receiving New York City Board of Education instruction in remand centers, 1,598 in institutional schools, 774 in psychiatric hospitals and treatment centers.

22. According to Dr. Mackler's definition, a school would be ethnically segregated, in 1963, if it had less than 6 per cent or more than 30 per cent of Negro students, and/or if it had less than 5 per cent or more than 17 per cent of Puerto Rican students. Mackler, p. 4.

23. This is an account of the situation that obtained in 1963-64. However, Dr. Mackler states that what was true then "was true for the years immediately in the past and probably true today." Mackler, p. 4.

24. Ftn. 11, *supra.*

25. New York Family Court Act, §§ 331, 332, 335, 337.

26. *Id.* §§ 352, 355.

27. According to the records produced by Miss Rakow, court's exhibits 1-19, there were 182 new suspensions during this period.

28. New York Family Court Act, §§ 352, 355.

29. *Mackler, A Report on the "600" Schools: Dilemmas, Problems, and Solutions.*

30. *Ibid.*

Appendix to Opinion

Listing of Special Schools •

The abbrevations used in the following listing includes:

P — Public School;
M — Manhattan;
X — Bronx;
Q — Queens;
K — Kings;
R — Richmond.

When there are two numerical designations, the first is the one currently in use, the second the number that school had under the former system of numbering special schools.

BOARD OF EDUCATION OF THE CITY OF NEW YORK

LISTING OF SPECIAL SCHOOLS

A. *Type "600" Day Schools Operated by the Board of Education*

School Name or Number		*Address*	*School Years*
Livingston	P-8-M: P-621-M	29 King Street, N. Y. 10014	7-12
Manhattan	P-58-M: P-622-M	490 Hudson St., N. Y. 10014	9-12
Cyrus W. Field	P-82-M: P-614-M	113 E. 4th St., N. Y. 10003	5-8
Francis Parkman	P-91-M: P-624-M	198 Forsyth St., N. Y. 10002	9-11
Peter Cooper	P-148-M	466 West End Ave., N. Y. 10024	5-9
John Barry	P-169-M: P-612-M	113 East 87th St., N. Y. 10028	K-9
Lewis and Clark	P-12-X: P-615-X	2555 Tratman Ave., N. Y. 10461	5-9
John Paul Jones	P-185-X: P-611-X	170 Brown Place, N. Y. 10454	Ungraded
Nathaniel Greene	P-36-K: P-617-K	251 Stagg St., Brooklyn 11206	5-9
Sterling School	P-85-K: P-614-K	227 Sterling Pl., Brooklyn 11238	9-11
James Lawrence	P-369-K: P-613-K	387 State St., Brooklyn 11217	5-9
Jim Thorp	P-370-K: P-616-K	3001 West 1st St., Brooklyn 11224	5-8
Lillian L. Rashkis	P-371-K: P-615-K	36th St. & 4th Ave., Brooklyn 11232	5-8
Orville Wright	P-4-Q: P-613-Q	39-25 Crescent St., L. I. City 11101 N.Y.	5-9
Walter Reed	P-9-Q: P-612-Q	58-74 57th St., Maspeth 11378 N. Y.	K-9
Lincoln School	P-23-Q: P-634-Q	138-11 35th Ave., Flushing 11354 N. Y.	5-9
Robert E. Peary	P-75-Q: P-611-Q	511 Seneca Ave., Ridgewood 11237 N. Y.	5-9

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B. *Remand Centers and Annexes*

Name or Number of Center or Annex	*Address*	*Owner, Operator or Sponsor*
Youth House—Girls P-187-X: P-613-X	765 Manida St., N. Y. 10459	Youth House, Inc.
Annex—Metropolitan Staff Home	Welfare Island, N. Y. 10017	Youth House, Inc.
Annex—Spofford Ave.	1221 Spofford Ave., N. Y. 10459	Youth House, Inc.
Youth House—Boys P-188-X: P-614-X	1221 Spofford Ave., N. Y. 10459	Youth House, Inc.
Annex: Zerega Ave. Camp	1188 Zerega Ave., N. Y. 10462	Youth House, Inc.
Annex: Forest Nbrd. House	955 Tinton Ave., N. Y. 10456	Youth House, Inc.

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C. *Institutional Schools*

Name or Number of School	*Address*	*Owner, Operator or Sponsor*
Children's Center P-35-M: P-405-M	1 East 104 St., N.Y. 10029	Dept. of Welfare
Annex Callagy Hall P-408-M	331 E. 12th St., N.Y. 10003	Dept. of Welfare
Villa Loretto P-94-M: P-617-M	Crompond Rd., Peekskill, N.Y.	Catholic
Hillcrest Center P-176-M: P-623-M	165 Haines Rd., Bedford Hills, N.Y.	Protestant
Little Flower P-181-M: P-625-M	P.O. Box 547 Wading River, N.Y.	Catholic
Pleasantville Cot. P-182-M: P-620-M	Pleasantville, N.Y.	Jewish
Mother Cabrini P-202-M: P-406-M	West Park, N.Y.	Catholic
Edenwald P-186-X: P-612-X	1250 E. 229th St. N.Y. 10466	Jewish
Rikers Island P-189-X: P-616-X	1212 Hazen St. E. Elmhurst 11370	Dept. of Corrections
St. Elizabeth's P-10-R: P-611-R	Mount Loretto, Staten Island 10309	Catholic
St. Joseph's P-25-R: P-612-R	Pleasant Plains, Staten Island 10309	Catholic

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D. *Psychiatric Hospitals, Treatment Center Annexes and Clusters*

Name or Number	*Address*	*Owner, Operator or Sponsor*
Bellevue Psy. Hosp. P-106-M: P-618-M	30th St. & 1st Ave., N.Y. 10016	Dept. of Hospitals
P-203-M (Cluster)		
Astor Home	Rhinebeck, N.Y.	Catholic
Manhattan School for Emotionally Dist. Children	12 W. 12th St., N.Y. 10003	(Same as name)
Phoenix School	74 St. Marks Pl. N.Y. 10003	Jewish
Beachbrook Nursery	2953 Av. X, Brooklyn 11235	(Same, Day Care Center)
Daytop Village	450 Bayview Ave., Prince's Bay, S.I.	Same
St. Mary's-in-the Field	Valhalla, N.Y.	Protestant
P-205-M (Cluster)		

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Name or Number	*Address*	*Owner, Operator or Sponsor*
Henry Ittleson Research Cen.	5050 Iselin Ave., Riverdale 10470	Jewish
Children's Day Treat. Cen. & School	255 W. 71st St., N.Y. 10023	(Same as name)
Hillside Hospital	75-59 263 St. Glen Oaks 11004	Jewish and Dept. of Hospitals
Jacobi Hospital (Annex)	Eastchester Rd., N.Y. 10461	Dept. of Hospitals
N.Y. Psych. Hospital (Annex)	722 W. 168th St., N.Y. 10032	(Same as name)
Kings County Psch. Hosp. P-368-K: P-612-K	606 Winthrop St., Brooklyn 11203	Dept. of Hospitals
Childville, Inc. (Annex)	130 Boerum St. Brooklyn 11206	(Same as name)
Mt. Sinai Hosp. (Annex)	1450 Madison Ave., N.Y. 10029	Jewish
Pride of Judea (Annex)	1000 Dumont Ave., Brooklyn 11208	Jewish
Lifeline Cen. Child Devlpt. (Annex)	84-74 169th St., Jamaica, N.Y. 11432	(Same as name)

Name or Number	*Address*	*Owner, Operator or Sponsor*
League School & Res. Cen. (Annex)	196 New York Ave., Brooklyn 11216	(Same as name—day care center)
P-224-Q (Cluster)	30-45 42nd St., L.I.C. 11103	
City Hosp. at Elmhurst	79-01 Broadway, Elmhurst 11373	Dept. of Hospital
Harlem School for Child Study	181 W. 135th St., N.Y. 10030	Dept. of Hospital (day care center)
Blueberry, Inc.	228 York St. Brooklyn 11201	(Same as name)
Ottilie Home for Children	85-70 148th St. Jamaica 11435	Protestant
Wayside Home for Girls	Valley Stream, N.Y.	Protestant
Bethlehem Luth. Chldn's Home (Annex)	375 Fingerboard Road, S.I. 10305	Protestant
Temple Israel (Annex)	315 Forest Ave., S.I. 10301	(Day care center) Staten Island Mental Health Society

APPENDIX C

BOARD OF EDUCATION OF THE CITY OF NEW YORK

OFFICE OF THE SUPERINTENDENT OF SCHOOLS

GENERAL CIRCULAR No. 16, 1965-1966

April 18, 1966

To ALL SUPERINTENDENTS, PRINCIPALS,
DIRECTORS AND HEADS OF BUREAUS

Ladies and Gentlemen:

PUPIL SUSPENSION

I. *Introduction*

This circular revises pupil suspension procedures and supersedes all previous circulars and references on the subject, such as Chapter 8, Manual of Attendance Procedures for Principals issued by the Bureau of Attendance and Chapter 4, Manual of Procedures issued by the Bureau of Child Guidance.

The suspension [1] of a pupil required to attend school is a serious step. The New York State Education Law gives the pupil the right to attend school. The parent by State Law has the responsibility for the pupil's regular attendance and orderly behavior while attending school. It is also the responsibility of the parent to maintain the pupil in proper mental and physical condition. The law assumes that the school will accept and instruct all educable pupils. For a variety of reasons some pupils cannot maintain themselves or be maintained in a classroom setting. The school will assume the responsibility to take all necessary steps in the educative process to provide the best education for all chlidren limited only by available budget and staff.

II. *Prevention*

The objective is to help children resolve their adjustment problems by all means available. In pursuit of this objective the school will assume the responsibility to refer pupils and their parents for specialized help.

In matters pertaining to suspension, it is recognized that authoritative steps may be necessary but in general the approach should be therapeutic rather than punitive.

If after all available remedial procedures have been applied a pupil remains disruptive or maladjusted to the extent that he does not profit from instruction or that he prevents other pupils from learning, he must be considered for removal from the school setting.

Each principal and teacher has a responsibility to identify pupils in need of help and to enlist the aid of the Board of Education's pupil personnel services as well as the resources available in the community. In addition, the principal should have available an adequate record indicating that the pupil was recognized to be in need of extra support and that attempts were made with parents to help the child. The success or failure of these attempts and other pertinent data should be an essential part of the record. However, there may be instances when the severity of a pupil's action will necessitate his suspension even though there be no previous history of disruptive behavior.

While suspension will remove the pupil from the classroom, the school will continue to seek help for him during the suspension period.

III. *Procedures*

Since the needs of children and parents differ, several procedures have been outlined. Within each procedure a stipulated sequence will be followed, but the procedures need not be sequential.

A. *Principal's Pre-Suspension Guidance Conference*

1. It is the principal's responsibility to hold a pre-suspension conference at an early stage to try to resolve the problem. Pre-suspension conferences attended by the appropriate personnel should be utilized as a helpful procedure. It is expected that the parent will be included in efforts to help the pupil in school adjustment. Under these conditions suspension is a step in an educational continuum.

2. The following format of notification to the parent to attend the pre-suspension conference should be used: (N.B. It is inadvisable to use a mimeographed or other duplicated form.)

"I regret to inform you that it may become necessary to suspend your son (daughter) from attending school. You are therefore requested to be at a conference in this office at the school on (time and date) for the purpose of deciding how your child can be helped without a loss in school time. Your attendance is needed so that we may all get together to help."

3. This conference should stress the seriousness of the problem. Inasmuch as this is a guidance conference for the purpose of providing an opportunity for parents, teachers, counselors, supervisors, et al, to plan educationally for the benefit of the child, attorneys seeking to represent the parent or the chid may not participate.

B. *Suspension—Principal's Guidance Conference*

As part of the plan to help the pupil adjust to the school program, the principal is authorized to take these measures:

1. He may suspend a pupil for a period not to exceed *five (5) School days* with immediate telephone notification to the District Superintendent.

2. Whenever a pupil under the care of Bureau of Child Guidance, or another agency or therapist is to be suspended, the principal shall consult with the Bureau of Child Guidance, or agency or therapist prior to the suspension. Final decision remains with the principal.

3. The principal will remove the pupil from his class and keep him under supervision until the close of the school day or the arrival of the parent or guardian.

4. The principal will notify the parent of the pupil by certified mail, return receipt requested, of the suspension of the pupil and will require that the parent confer with him in his office within the five school day period. He will send a copy of the letter to his District Superintendent.

The following format of notification should be used: (N.B. It is inadvisable to use a mimeographed or other duplicated form.)

"I regret that it has become necessary to suspend your son (daughter). Please be in my office (time and date) for a conference to determine the future steps we may take together to make possible his return to school. Until further notice your child should be kept at home during school hours."

5. The conference will be conducted by the principal and it should be as formal as the situation requires. The parent or legal guardian should be apprised of the reason for suspension, the prior efforts of the school and the need for improvement. Parental responsibility should be emphasized. The principal may invite such Board of Education school personnel as will assist in helping the pupil and the parent. Every effort should be made to secure the parent's attendance. However, if the parent or legal guardian

fails to appear, the guidance conference will be held without him. Inasmuch as this is a guidance conference for the purpose of providing an opportunity for parents, teachers, counselors, and supervisors, etc. to plan educationally for the benefit of the child, attorneys seeking to represent the parent or the child may not participate. A permanent record of the guidance conference will be maintained by the principal.

6. A pupil suspended under these provisions must be returned to the school by the principal no later than five school days atfer the day of the principal's suspension unless the principal proceeds in accordance with subdivision C below by instituting a suspension requiring a District Superintendent conference.

7. A pupil suspended by the principal under this section

(B) may not be suspended *on more than than two occasions during the school year. These may not be consecutive periods of suspension.*

8. At the end of every attendance reporting period of the school year, each principal will send to the District Superintendent:

(1) The name of each pupil suspended

(2) The reason for the suspension

(3) Date suspended

(4) Date of principal's hearing

(5) Date of pupil's return to his class

(6) Number of school days suspended

9. The suspended pupil will remain on the register of his school and will be marked absent in the roll book during the period of suspension.

C. *Suspension—District Superintendent's Guidance Conference*

Under this procedure, the principal may suspend a pupil for appropriate reasons at any time and must notify the district superintendent immediately. If possible consultation as indicated in B-2 should be held. These steps will be followed:

1. The principal will telephone the district superintendent stating the immediate cause for suspension. The principal will remove the pupil from his class and keep him under supervision until the close of the school day or the arrival of a parent or guardian. He will give such parent or guardian a copy of the letter of suspension and obtain a receipt therefor.

2. If a parent or guardian does not call at the school, the principal will notify such parent by certified mail or return receipt requested, on the same day. The following format of notification should be used:

> "I regret that it has become necessary to suspend your son (daughter) from attending classes in a public school until further notice. You will be informed by the district superintendent of the time and place of the conference which will provide an opportunity for a discussion of this matter. During the period of suspension your son (daughter) should be kept at home during school hours."

A copy of this letter is to be forwarded to the district superintendent.

3. Within five school days after the notice of suspension, the principal will send to the district superintendent, as required by him, copies of a report on the pupil's acts

of misbehavior in chronological order. This statement will also include the time, place and nature of the precipitating cause of suspension, the steps taken by the school to help the pupil and any information indicating the interest and/or assistance of any Bureau of the Board of Education or community agency. The statement will include identifying data and the standardized test scores of the pupil. The principal or his representative will bring with him to the district superintendent's guidance conference the pupil's official records (cumulative record, health record, test record and any other record) after which they will be returned to the school files.

4. The district superintendent will arrange for a guidance conference to be conducted within 10 school days of the date of his receipt of the principal's notice to the parent. The District Superintendent over his name will send a notice of the time and place of such conference to the parent, school principal and any other appropriate personnel he may wish present. In addition, the Bureau of Attendance will be responsible for notifying the parent to attend the conference. The Bureau will be given at least five school days for this notification. Inasmuch as this is a guidance conference for the purpose of providing an opportunity for parents, teachers, counselors, supervisors, et al. to plan educationally for the benefit of the child, attorneys seeking to represent the parent or the child may not participate.

The guidance conference when conducted by the District Superintendent will afford him an opportunity to help in the adjustment of the pupil. The parent and the child should be helped to understand the seriousness of the problem and be encouraged to contribute to the solutions. It may be desirable to excuse the child or other persons

from the conference room during parts of the conference. Every effort should be made to secure the parent's attendance. However, if the parent fails to appear, the guidance conference may be conducted without him. A summary of the findings and recommendations will be kept by the district superintendent.

5. A decision concerning the disposition of the case will be made by the district superintendent at the conference or within five school days following. Notice of this decision will be given in writing over the name of the District Superintendent to the principal, parent, district supervising attendance officer of the attendance district concerned and any person or agency the district superintendent wishes to notify.

The district superintendent's decision may include the pupil's reinstatement, transfer to another school, referral for placement in a school for socially maladjusted children, referral to the Bureau of Child Guidance or other suitable agency for study and recommendations, including medical suspension, home instruction, exemption[2] or a referral to the Bureau of Attendance for court action. In the latter instance, school personnel will make themselves available for testimony in court.

6. The cases of children who are not placed in school following the conference will be reviewed continually by the district superintendent in an effort to explore every possible resource for the child. If school placement or other appropriate disposition is not possible, the district superintendent is empowered to continue the suspension until there is available a resource which will allow for the adequate and required instruction of the suspended pupil.

7. When a district superintendent decides to return a suspended high school pupil to a high school in another district, he should either consult with the district superin-

tendent of the other district in order to arrive at a mutually acceptable decision or he should refer the case to the High School Placement Bureau.

8. The suspended pupil will remain on the register of his school and will be marked absent in the roll book beginning with the date of suspension and continuing until he is returned to school, transferred or discharged.[8] Appropriate notation of the suspension will be recorded in the roll book and on the pupil's cumulative record card.

9. A suspended pupil who moves to another school district within the City shall be placed immediately upon the register of the school serving the new residence and suspension shall be continued. All pertinent information will be forwarded to the district superintendent of the new district. Final disposition of the case will be made by the district superintendent of the new district.

10. At the end of each attendance reporting period of the school year, the district superintendent will forward to the Superintendent of Schools a report on pupil suspensions. (For your information a sample copy is attached.) This report will include:

a. A summary of the district superintendent's suspensions and descriptive data regarding disposition and status as well as time elapsed since the date of suspension. The attached form will be used.

b. The number of principal suspensions and the number of days the pupils were out of schools.

11. A referral to the Bureau of Child Guidance as a result of the suspension conference, should be made on the

appropriate Bureau of Child Guidance form to facilitate follow-up and record keeping.

Very truly yours,

JOHN B. KING
Executive Deputy Superintendent of Schools

Enc.

FOOTNOTES

[1] Suspension is defined as a temporary cessation of a pupil's school attendance as described herein. New York State Education Law authorizes the Superintendent of Schools or the District Superintendent to suspend a pupil. Such authority to suspend is hereby delegated by the Superintendent of Schools to the principal.

[2] Exemption is defined as the withdrawal of a child's right to attend a public school. Authority to exempt from required school attendance is reserved to the Superintendent of Schools.

[3] A suspended pupil who is subsequently remanded to Youth House or to the Psychiatric Division of Kings County Hospital or Bellevue Hospital is automatically placed on the register of the school for socially maladjusted children. The original school will indicate in its roll book that the pupil is remanded and will mark him present for this period. State Aid requires this recording. However, the school status of the suspended pupil is unchanged. He may not return to his original or any other public school without the authorization of the district superintendent in whose district the pupil was originally suspended.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1203

VICTOR MADERA, RAMIRO MADERA, MANUELA MADERA, and all other persons similarly situated,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF NEW YORK, BERNARD E. DONOVAN as Superintendent of Schools of the City of New York, THERESA RAKOW as District Superintendent of Public Schools for District One in the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Rules and Procedure:

New York City Board of Education, General Circular No. 16 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1203

VICTOR MADERA, RAMIRO MADERA, MANUELA MADERA, and all other persons similarly situated,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF NEW YORK, BERNARD E. DONOVAN as Superintendent of Schools of the City of New York, THERESA RAKOW as District Superintendent of Public Schools for District One in the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

Petitioners seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit entered on December 6, 1967. That judgment unanimously reversed a judgment of the United States District Court for the Southern District of New York (MOTLEY, J.), vacated an injunction granted in that court and dismissed the complaint.

Question Presented

Every school system must face the problem presented by children who fail to make an adequate emotional adjustment to the requirements of group education. Disruptive behaviour by one child can halt the education of an entire class. Victor Madera became a behaviour problem to the point where his principal suspended him and referred the question of Victor's educational difficulty to the District Superintendent. Victor and his parents were requested to attend a guidanee conference where, with the aid of an advisor of their choice, they could discuss Victor's problems with school officials and plan the next phase of his education. The Board of Education does not consider the conference to be adversary in nature and, hence, does not include attorneys among those invited to attend. Social workers, psychologists or religious counsellors would be welcomed to assist the student and his parents in the conference. The object of the conference is to find an answer to the student's behavioral problem and provide an educational environment where he can progress, more effectively.

As a result of the conference the following decisions may be reached: (1) the student may be reinstated in the same school, (2) he may be transferred to another school of the same type, (3) with his parents' consent, he may be transferred to a special school for socially maladjusted children, (4) the student may be referred to the Bureau of Child Guidance for psychiatric or psychological assistance or to some other social agency for study and recommendation, or (5) where truancy is in question, the matter may be referred to the Bureau of Attendance for court action.

The parents of Victor Madera asked to be represented by an attorney when they were requested to attend a conference with school officials concerning their son. In accord with the policy of the Board of Education that the

conference should not be adversary in form or substance, the request was denied.

Thus the question is posed: Do students and parents have a constitutional right to be represented by counsel at a guidance conference?

Facts

When this proceeding was commenced in the United States District Court for the Southern District of New York, petitioner Victor Madera was a 14-year-old student in the seventh grade in Junior High School No. 22, District No. 1 of the New York City public school system. Victor had experienced serious behavioral difficulties in school over a period of more than a year (R94-98).*

Ultimately, Victor's principal decided that suspension was warranted. The principal of a school is authorized to suspend a pupil for a period of not more than five days during which time he reports the child's status to the District Superintendent, his superior. If the child is not restored to regular classes within the five-day period, it is the obligation of the District Superintendent to schedule a Guidance Conference for the purpose of considering the status of the child and making a determination as to the appropriate educational assignment deemed best in the light of the personal needs and abilities of the student (R70-81).

In this case, pursuant to the regular practice, the parents were notified to attend a conference in the District Superintendent's office. They sought legal counsel, and petitioners' present counsel, the legal division of Mobilization For Youth, asked to appear on behalf of Mr. and Mrs. Madera and their son. This request was denied in accord-

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* Unless otherwise stated all numbers in parentheses refer to pages in the Record filed with the United States Court of Appeals for the Second Circuit.

ance with the provisions of Circular No. 16, dated April 18, 1966, which sets forth the procedure to be followed by District School Superintendents in conducting guidance conferences for suspended students (R70-80). Plaintiffs then sought and obtained an injunction from the District Court staying the guidance conference until the question of their right to counsel could be determined.*

Counsel are precluded from attending guidance conferences for policy reasons set forth in Circular No. 16 as follows:

> "Inasmuch as this is a guidance conference for the purpose of providing an opportunity for parents, teachers, counselors, supervisors, et al. to plan educationally for the benefit of the child, attorneys seeking to represent the parent or the child may not participate." (App. c of Petition, 74a)

The participation of the parents, however, is most desirable. The Circular states, "Every effort should be made to secure the parent's attendance" (*Id.* at 75a). In addition, the parents may be accompanied and assisted by persons of their choosing including social workers, friends, translators, etc., so long as those persons are not attorneys.

As a result of the conference the district superintendent may reinstate the student in his same school, transfer him to another school, refer him for placement in a school for socially maladjusted children, refer him to the Bureau of Child Guidance or other suitable agency for study and recommendations, including medical suspension, home instruction, exemption or, where truancy is a problem, refer him to the Bureau of Attendance for court action (R79).

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* Because of the injunction and the subsequent appeal, in order to make sure that Victor Madera's education was continued, he was first put on home instruction and later transferred to another school of the same type as the one in which he was originally enrolled.

The Bureau of Child Guidance is the clinical arm of the school board and is brought into use when professional psychological or psychiatric assistance in diagnosis appears helpful (R230-251).

The Bureau of Attendance acts in cases of truancy to see that children and parents comply with the compulsory attendance provisions of the Education Law (R251-257, 281-285).

It should be noted that district superintendents do not have power to exempt a child from attending school; this is reserved to the Superintendent of Schools and is rarely used (R79, 81, 224).

The purpose of the guidance conference was set forth in the affidavit of Bernard E. Donovan, Superintendent of Schools, as follows:

> "The sole purpose of the conference is to study the facts and circumstances surrounding the temporary suspension of this student by his school principal, and to place the child in a more productive educational situation. At these conferences the assistant superintendent interviews the child, his parents and school personnel to learn the cause of the child's behavior. The conference is conducted in an atmosphere of understanding and cooperation, in a joint effort involving the parent, the school, guidance personnel and community and religious agencies. There is never any element of the punitive, but rather an emphasis on finding a solution to the problem.
>
> After a full and careful study and discussion a plan is formulated to deal more adequately with the problems presented by the child. Every effort is bent towards the maintenance of a guidance approach. The emphasis is on returning the child as rapidly as possible to an educational setting calculated to be most useful to him." (R89-90)

No one within the entire structure of the Board of Education has the power to deprive a child of his freedom by confinement or commitment to an institution (R90, 242, 245, 247, 249, 250, 300, 322). Such matters are left to the courts where the right of counsel is not questioned.

The Decisions Below

The essence of the District Court's decision was expressed as follows (41a-42a):

> "As a result of a review of the testimony, exhibits and records produced by the District Superintendent, this court finds that a 'Guidance Conference' can ultimately result in loss of personal liberty to a child or in a suspension which is the functional equivalent of his expulsion from the public schools or in a withdrawal of his right to attend the public schools.
>
> This court also finds that as a result of a 'Guidance Conference', adult plaintiffs may be in jeopardy of being proceeded against in a child neglect proceeding in the Family Court.
>
> For the foregoing reasons, this court concludes that the due process clause of the Fourteenth Amendment to the Federal Constitution is applicable to a District Superintendent's Guidance Conference. More specifically, this court concludes that enforcement by defendants of the 'no attorneys provision' of Circular No. 16 deprives plaintiffs of their right to a hearing in a state initiated proceeding which puts in jeopardy the minor plaintiff's liberty and right to attend the public schools."

In reversing the District Court the Circuit Court stated (23a-24a):

> "The conference is not a judicial or even a quasi-judicial hearing. Neither the child nor his parents

are being accused. In saying that the provision against the presence of an attorney for the pupil in a District Superintendent's Guidance Conference 'results in depriving plaintiffs of their constitutionally protected right to a hearing' (267 F. Supp. at 373), the trial court misconceives the function of the conference and the role which the participants therein play with respect to the education and the welfare of the child. Law and order in the classroom should be the responsibility of our respective educational systems. The courts should not usurp this function and turn disciplinary problems, involving suspensions, into criminal adversary proceedings—which they definitely are not. The rules, regulations, procedures and practices disclosed on this record evince a high regard for the best interest and welfare of the child. The courts would do well to recognize this."

[NOTE: In their appeal to the Circuit Court the respondents raised issues relating to the conduct of the trial and rulings of the District Court as follows:

1. The District Court refused to permit counsel for defendant to inspect Court's Exhibit 21, a student's suspense file, for purposes of cross-examining a witness who had described the exhibit at length in response to questions by the Court (R274-275).

2. After the trial was over, the District Court, on its own motion, added 23 new exhibits (also suspense files) to the record without affording defendants an opportunity to object to their introduction or to examine witnesses concerning them (R47).

3. On the last day of trial, at the close of plaintiffs' case, the District Court granted plaintiffs' motion to convert the suit into a class action. The class was never

adequately defined nor was there any notice given to any member of the class however defined (R317, 319).

In light of the decision by the Circuit Court it was unnecessary for these matters to be ruled upon. However, should this Court grant certiorari in this case, respondents wish to preserve their rights to present all issues raised on their appeal to the Circuit Court.]

POINT I

The nature of the guidance conference is informal and not adversary. Legal counsel under these circumstances is not required.

Petitioners stress the problems facing the urban poor community and the effective assistance provided by organizations such as Mobilization for Youth. They conclude however that the unique skills of an attorney become necessary in a non-adversary meeting—a guidance conference—even though the same organization could and in fact does have social workers who are welcome to attend. Their argument assumes that the interests of the school system and the children in it are adverse. They disregard one of the basic postulates of public school education—that teachers, counsellors, students and parents are mutually interdependent and should work cooperatively toward the goals of education for all children. There is nothing in the training of attorneys that makes them uniquely qualified to assist in this process.

There are about 28,000 children in Victor Madera's school district. Of these, about 150 were suspended pending appropriate action pursuant to the district superintendent's guidance conference in the past two years. Some of these students moved away, were unable for medical reasons to resume their education or passed the age for compulsory education and did not wish to resume. For

the great majority, however, the suspension was a temporary interruption but not a termination of their education.

The loss of education, of course, for even one student is regrettable. Unfortunately, however, there are a few students that do not adjust to school environment, even with extensive professional help. The percentage of students for whom a guidance conference becomes necessary is small. The percentage of those who do not return to a class as a result of action taken at a guidance conference is extremely small compared to the student body as a whole.

Respondents do not suggest, however, that the answers to the questions raised here can be found in the statistics of pupil suspensions. Rather it is the nature of the educational process and the proper relation between the schools and the pupils that must be considered in the search for a solution. These factors are in areas of policy where precedent is not conclusive. If incarceration were truly the question, as suggested by the district court below (41a), the answer would be simpler. The district superintendent, however, has no power to confine the child—this power is reserved to the courts. Nor does the district superintendent have power to adjudicate any charges against the parents. This too is reserved for the courts.

The professional competence needed to deal wisely and fairly with suspended students is found in various disciplines including education, guidance counselling, social work, psychology and psychiatry. The implications of this suit are that the members of the Board of Education's staff, professionally trained in these areas, are in reality opposed in interest to the students they are attempting to instruct or assist. On this assumption petitioners claim a lawyer is essential at the guidance conference to defend the suspended child. This approach will not help either the child or the school.

The exclusion of lawyers is based on both practical and policy considerations growing out of the need for decisions to be made by people properly trained and authorized to make them and the belief that educational values will suffer in an adversary proceeding.

While this case tends to focus solely on the individual child on suspension, the needs of the student body as a whole should not be ignored. A disturbed, disruptive child needs help, but those in classes with him, including his teachers, also have rights, and these include the right to go about their work without excessive disturbances or threats to their safety. This does not mean that respondents claim the right to ignore the needs of difficult children. The record here shows the varied and extensive facilities and professional services set up solely to assist them.

Under the present system if the educators fail and reach an arbitrary or unwarranted decision, the student is not without relief. There can be appeals to the Commissioner of Education or a review by an Article 78 proceeding in the Supreme Court of New York—both with the right of counsel. In this way errors can be corrected, when a right to relief is shown, without taking over the internal operations of the schools.

Due process requires no more than the right of counsel where appropriate. There is no showing that counsel at a guidance conference is required.

POINT II

The exclusion of attorneys from participation in a guidance conference does not violate the requirements of due process of law.

A. Guidance conference procedure.

The day a student is suspended by the principal a letter is sent to his parents notifying them of the suspension and

advising them that a guidance conference will be held soon thereafter (R168). A copy of the principal's letter is also sent to the Assistant Superintendent, who then sends a letter to the parents notifying them of the date of the conference and asking them to be present. (See Appendix C, 68a-77a.) At the conference, as District Superintendent Rakow testified:

> "No decision is made until the parent and child have participated." (R228)

Not only are great efforts made to have the parents appear, but they may bring with them social workers familiar with the situation and a translator if necessary. The Board also will supply a translator if advised that the parents do not speak English. The conference, in short, is an attempt by qualified educators and guidance counsellors, working together with a child, his parents and interested outside social workers, to find the best educational answer for a student with a behavioral problem.

The Court of Appeals correctly distinguished between judicial due process required at formal proceedings and the non-judicial due process required in an informal proceeding such as a guidance conference.

B. The requirements of due process.

The essentials of due process required in a criminal or civil judicial proceeding are well established and include at least the following: (1) proper notice, (2) an impartial hearing, (3) the right to confront and cross-examine adverse witnesses, (4) the right to summon witnesses and offer evidence, (5) the privilege against self incrimination, and (6) the right to be represented by counsel. This is especially so where the proceedings may terminate in incarceration. *In Re Gault,* 387 U. S. 1 (1967); *Kent* v. *United States,* 383 U. S. 541 (1966). The question is

whether such requirements must be included in an informal guidance conference where the purpose of the conference is to determine how best to meet the educational needs of the pupil.

It is axiomatic that "the requirements of due process frequently vary with the proceeding involved . . ." *Hannah* v. *Larche,* 363 U. S. 420, 440 (1960), and "what is due process of law must be determined by circumstances." (*Reaves* v. *Ainsworth,* 219 U. S. 296, 304 [1911].)

There is a clear distinction between a judicial hearing and an informal proceeding. "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end." (*Prentiss* v. *Atlantic Coast Line,* 211 U. S. 210, 226 [1908].) Where, however, the occasion calls for a proceeding less formal than a judicial inquiry, it should "be so fitted in its range to the needs of the occasion." (*Escoe* v. *Zerbst,* 295 U. S. 490, 493 [1935].)

As this Court declared in *Cafeteria and Restaurant Workers Union* v. *McElroy,* 367 U. S. 886, 894-895 (1961):

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. * * * The very nature of due process negates any concept of inflexible procedures applicable to every imaginable situation. [citations omitted] ' "[D]ue process", unlike some legal rules is not a technical conception with fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions * * *.' *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 162-163 (concurring opinion)."

C. There is no due process requirement for counsel at an informal proceeding such as a suspension guidance conference.

Informal proceedings on matters of importance under many conditions comply with the requirements of "due process" without representation by counsel.

The need for counsel varies with the nature of the proceeding. *In re Groban,* 352 U. S. 330 (1957).

Where due process does require counsel it is because "the benefit of counsel . . . [is] essential to the substance of the hearing." *Palko* v. *Connecticut,* 302 U. S. 319, 327 (1937). The nature of the proceeding must determine whether "under the circumstances the necessity of counsel . . . [is] vital and imperative . . ." *Powell* v. *Alabama,* 287 U. S. 45, 71 (1932). The Court here must look to the substance of the proceeding to determine if the student "requires the guiding hand of counsel at every step in the proceeding . . ." *Powell* v. *Alabama, supra,* 287 U. S. at p. 69.

Is there a need for the attorney's skills at the guidance conference? There is no adversary. No attorney is present for the Board of Education. There is no prosecutor, no judge, no jury and there are no complex rules of procedure. *Cf. Powell* v. *Alabama, supra.* There are no witnesses to be examined under oath. Formal rules of evidence are not applied. None of these, however, are essential to a concept of fundamental fairness under the circumstances. To hold that the right of representation by counsel is essential must eventually involve the federal courts in a continuing and expanding supervision of the guidance conference to determine, at each juncture, whether, and which specifics of the Fifth and Sixth Amendments are also essential.

If the professional conclusion is that the student should be transferred to a parental school or to an institution

either for reason of physical or mental health or other reasons, the transfer may only be accomplished with the consent of the parents or by court order.*

No school official has this authority (Education Law § 3214). At this stage the parent may refuse such consent in which event the child may not be transferred without a judicial proceeding in the Family Court (Family Court Act § 758). The right to representation by counsel is guaranteed at that proceeding (*id.*, § 741), and the Court may consider no evidence that is not "competent, material and relevant . . ." (*id.*, § 744). In addition, as pointed out in the Circuit Court decision (8a), it is clear that statements made by the student or his parents at the guidance conference could not be introduced into evidence in any subsequent court proceedings. *Cf. Garrity* v. *New Jersey*, 385 U. S. 493 (1967); *Spevack* v. *Klein*, 385 U. S. 511 (1967); *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Escobedo* v. *Illinois*, 378 U. S. 478 (1964).

Thus, it appears that neither actual need nor due process requires representation by counsel at the guidance conference. Lawyers are usually not trained as social workers, educators, guidance counselors or psychologists. If the guidance conference should be turned into an adversary proceeding, a lawyer should attend, perhaps for both "sides," and hearing officers should be appointed to preside and make the necessary rulings. Respondents believe this approach is both unnecessary and unwise when viewed from the point of view of the student, his parents or the school system.

D. Review proceedings are available to set aside the results of a guidance conference.

Sections 310 and 311 of the New York Education Law provide for a review on appeal to the Commissioner of

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* Of course, prior to determining whether to consent or not the parent may seek the advice of counsel.

Education in the case of any child or parent aggrieved by the actions of any school authority including cases where a child is suspended.

Pursuant to Section 310 the Commissioner of Education has heard a number of cases involving the suspension of students from school. *Matter of Sheffel,* 73 N. Y. St. Dept. Rep. 104; *Matter of Yonkes,* 78 N. Y. St. Dept. Rep. 66; *Application of Olson,* 40 Misc 2d 246, 242 N.Y.S. 2d 1002, 1003 (Sup. Ct., Nassau Co., 1963). At hearings dealing with suspension of a student from class which may involve disputed issues of fact, the Commissioner of Education would be required to conduct a judicial hearing "according to procedure which satisfied the rudiments of due process of law . . ." *O'Brien* v. *Commissioner of Education,* 4 N Y 2d 140, 146, 149 N. E. 2d 705 (1958) (concurring opinion of Judge Van Voorhis). Thus, at that hearing the student and his parents have the right to be represented by counsel. Prior to or during the hearing the Commissioner could stay the suspension or other action of the school authorities (Education Law § 311 [2]).* Following the hearing he may "make all orders . . . which may, in his judgment be proper or necessary to give effect to his decision" (Education Law § 311 [4]).

The fact that a formal hearing with counsel is afforded by the Commissioner and not at the guidance conference does not violate due process.

Where, as here, the guidance conference gives the student notice and a full opportunity to be heard in an informal non-judicial setting and where there is a statutory system for a petition or appeal to the Commissioner of Education with all the safeguards of a judicial proceeding,

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* While rightfully concerned that some students remained suspended for lengthy periods of time, the petitioners and the District Court fail to recognize that by petition or appeal to the Commissioner of Education the student may obtain a stay of the suspension pending the Commissioner's determination.

representation by counsel should not be required at the conference. The presence of an attorney could in fact "so far encumber the . . . proceeding as to make it unworkable or unwieldy" (*In re Groban, supra,* at p. 334), and obstruct the very aim of the guidance conference which is to provide for the continuing education of the student.

As an alternative to an appeal to the Commissioner of Education, a person aggrieved by acts of the Board of Education may have a prompt review in the New York State Supreme Court in an Article 78 proceeding (New York Civil Practice Law and Rules, Section 7801-7806).

An Article 78 proceeding may be, and frequently is, commenced by service of an order to show cause and a petition. The court, of course, may include a stay of administrative action pending determination of the matter by the court.

This procedure was followed in a suspense case very similar to this. *Cosme* v. *Board of Education,* 50 Misc 2d 344, 270 N.Y.S. 2d 231 (1966), affirmed without opinion, 27 A D 2d 905 (1st Dept. 1967). The lower court in *Cosme* held that legal counsel was not required at a guidance conference and stated (270 N.Y.S. 2d at p. 232):

> "These hearings are simple interviews or conferences which include school officials and the child's parents. Further, they are purely administrative in nature, and are never punitive. The parents are fully apprised of all of the facts and are furnished with copies of all information in respondent's possession."

By constitutional standards of due process there is no right to an attorney at the conference. By simpler standards of policy there is no need for an attorney at the conference. The school system of New York City has many problems—some of them severe—but it does not follow that the solutions will come by extending the right

of counsel into areas of educational planning regarding the best method of dealing with and providing an education for a child with a behavioral problem. School officials can be held to account for any unlawful decisions they may make or unlawful practices they may adopt, but the day to day operations of the schools should not be conducted as quasi-judicial proceedings. The work of the schools must continue. Individual rights must be protected. The present system affords a constitutional and practical balance of the interests of both. Thus there is no need for a further review of this case. The Court of Appeals for the Second Circuit carefully considered each of petitioners' contentions and held that the present practice does not deprive students or their parents of due process of law. Petitioners have failed to show any error in the analysis of the Circuit Court which would warrant granting a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

April 5, 1968.

Respectfully submitted,

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